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No. 61466-5-I

COURT OF APPEALS FOR THE STATE OF WASHINGTON DIVISION I

MICHAEL MORGAN, Appellant/Cross-Respondent,

v.

CITY OF FEDERAL WAY, et al., Respondents/Cross-Appellants

&

TACOMA NEWS, INC., Intervenor/Respondent



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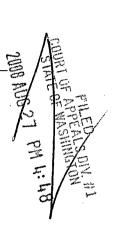


TABLE OF CONTENTS

		<u>Page</u>
INTR	ODUC	TION1
REST	TATEM.	IENT OF ISSUES ON MORGAN APPEAL4
ASSI	GNME	NTS OF ERROR ON CROSS-APPEAL5
STAT	TEMEN	NT OF ISSUES ON CROSS-APPEAL5
STAT	EMEN	NT OF THE CASE6
5.1	The City Receives a Complaint of a "Hostile Work Environment" at the Municipal Court6	
5.2	Comp	City Initiates an Investigation of the claimt Pursuant to the City's Antissment Policy6
	5.2.1	The City Anti-Harassment Policy mandates an investigation
	5.2.2	The City seeks Judge Morgan's cooperation but elects to proceed with hiring an investigator without Judge Morgan's approval7
	5.2.3	The engagement of Amy Stephson differs from the earlier Plenefisch investigation7
5.3		e Morgan Seeks to Terminate the tigation8
	5.3.1 5.3.2	
5.4		e Morgan Obtains an Ex-Parte Injunction out Making Any Effort to Notify the City11
5.5	Injun	Prochnau Vacates the Improper ction and Orders Certain Documents
5.6		rial Court Denies the City's Request for

6.			OF ARGUMENT IN RESPONSE TO	15
7.	ARG	UMEN	T ON MORGAN APPEAL	18
	7.1	The Stephson Report Is a City Document and a Public Record		
		7.1.1	The City initiated and carried out the investigation on behalf of the City, which makes the Stephson Report a City record, subject to the PRA.	19
		7.1.2	Even if the investigation could have been conducted by the Municipal Court pursuant to General Rule 29, in this case, the City – not the Municipal Court – conducted the investigation.	24
		7.1.3	By agreeing to allow the City to investigate, Judge Morgan waived any objections he may have had to the City creating records about its investigation.	25
	7.2	Disclo	Stephson Report Is Not Exempt From Dosure Based on the Attorney-Client Dege or the Work Product Doctrine	26
		7.2.1	To determine whether a record is exempt from disclosure, the Court must look at why the record was created. If it was not prepared to provide legal advice or prepared for litigation, the record is not exempt from disclosure	27
		7.2.2	-	
		7.2.3	Judge Morgan's contemporaneous emails show he thought Ms. Stephson was acting as an investigator, not an attorney	
		7.2.4	The Stephson Report does not contain any legal advice	
		7.2.5	The Stephson Report was created in the ordinary course of business, not in anticipation of litigation.	33

	7.3	Discl	The Bellevue John Does Case Mandates Disclosure of the Stephson Report Because the	
		Report Details Judge Morgan's Substantiated Conduct and Behaviors		35
		7.3.1	In <i>Bellevue John Does</i> , the Supreme Court only exempted records to protect teacher privacy.	36
		7.3.2	The Stephson Report detailed Judge Morgan's substantiated conduct and behaviors, making it subject to disclosure under <i>Bellevue John</i>	27
		722	Does.	37
		7.3.3	This case does not raise the same privacy interests at issue in <i>Bellevue John Does</i>	38
	7.4	Privil	e Morgan Waived Any Attorney-Client ege When he Forwarded the City ney's Email	41
8.	ARG	UMEN'	T ON CITY'S CROSS APPEAL	43
	8.1	Stand	ard of Review	43
	8.2	The City Is Entitled to Attorney Fees for the City's Efforts to Vacate the TRO		44
		8.2.1	Washington law allows for an award of attorney fees a party incurs in vacating a wrongly issued TRO	
		8.2.2	Judge Morgan wrongly obtained a TRO, so the City is entitled to attorney fees	45
		8.2.3	The PRA does not prohibit an award of attorney fees when a third party wrongfully obtains a TRO.	45
9.	CON	CLUSI	ON	48

TABLE OF AUTHORITIES

CASES

Bellevue John Does v. Bellevue School Dist., Wn.2d, 189 P.3d 139 (2008)	- 40
Beuhler v. Small, 115 Wn. App. 914, 64 P.3d 78 (2003)	19
Bohn v. Cody, 119 Wn.2d 357, 832 P.2d 71 (1992)	27
Bouton v. BMW of N. Am., 29 F.3d 103 (3d Cir. 1994)	21
Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998)	30
Cecil v. Dominy, 69 Wn.2d 289, 418 P.2d 233 (1966)	45
City of Spokane v. County of Spokane, 158 Wn.2d 661, 146 P.3d 893 (2006)	22
City of Wenatchee v. Owens, , Wn. App, 185 P.3d 1218, 1220-21 (2008)	
Collins v. Mullins, 170 F.R.D. 132 (W.D. Va. 1996)	34
Columbia Publ'g Co. v. City of Vancouver, 36 Wn. App. 25, 671 P.2d 280 (1983)	40
Concerned Rate Payers Ass'n v. PUD No. 1, 138 Wn.2d 950 (1999)	21
Confederated Tribes of the Chehalis Reservation v. Johnson, 135 Wn.2d 734, 958 P.2d 260 (1998)	48
Quinn Constr. Co. v. King County Fire Prot. Dist., 111 Wn. App. 19, 44 P.3d 865 (2002)	48
Cornell Pump Co. v. City of Bellingham, 123 Wn. App. 226, 98 P.3d 84 (2004)	
Dawson v. Daly, 120 Wn.2d 782, 845 P.2d 995 (1993)	

Faregher v. City of Boco Baton, 524 U.S. 7775 (1998)	. 30
Hangartner v. City of Seattle, 151 W.2d 439, 90 P.3d 26 (2004)	. 28
Heidebrink v. Moriwaki, 104 Wn.2d 392, 706 P.2d 212 (1985)	. 33
Ino Ino, Inc. v. City of Bellevue, 132 Wn.2d 103, 937 P.2d 154 (1997)	. 44
Nash v. Electrospace Sys., Inc., 9 F.3d 401 (5th Cir. 1993)	. 21
Nast v. Michaels, 107 Wn.2d 300, 305-06, 730 P.2d 54 (1986)	. 19
Olver v. Fowler, 161 Wn.2d 655, 168 P.3d 348 (2007)	. 43
Payton v. New Jersey Turnpike Authority, 691 A.2d 321 (N.J. 1997)29, 30-31,	, 33
Progressive Animal Welfare Society v. University of Washington, 125 Wn.2d 243, 884 P.2d 592 (1995)	. 35
Reed v. Baxter, 134 F.3d 351 (6th Cir. 1998)	. 42
Sangster v. Alberston's, Inc., 99 Wn. App. 156, 991 P.2d 674 (2000)	. 30
Seattle Firefighters Union v. Hollister, 48 Wn. App. 129, 737 P.2d 1302 (1987)	
Soter v. Cowles Publ'g Co., 131 Wn. App. 882, 130 P.3d 840 (2006), aff'd, 162 Wn.2d 716, 174 P.3d 60 (2007)	34
Spokane & Eastern Lawyers v. Tompkins, 136 Wn. App. 616, 150 P.3d 158 (2007)	19
Spokane Police Guild v. Wash. State Liquor Control Board, 112 Wn.2d 30, 769 P.2d 283 (1989)	.44
Spokane Research & Defense Fund v. City of Spokane, 99 Wn. App. 452, 994 P.2d 267 (2000)	40

T.S. v. Boy Scouts of Am.,	
157 Wn.2d 416, 138 P.3d 1053 (2006)	43
STATUTES	
RCW § 35A.13.120	42
RCW § 42.56.010(2)	
RCW § 42.56.030	49
RCW § 42.56.230(2)	36, 38, 39
RCW § 42.56.250(5)	
RCW § 42.56.540	
RCW § 42.56.550(3)	49

1. INTRODUCTION

This case arises out of a complaint by a Federal Way Municipal Court (Municipal Court) employee about the hostile work environment at the court, which resulted in an investigation of the court's Presiding Judge, petitioner/appellant Michael Morgan. The City of Federal Way (City), acting under its Anti-Harassment Policy, hired Amy Stephson to investigate this claim. Ms. Stephson investigated and prepared a report – the Stephson Report – summarizing her factual findings. The Stephson Report details Judge Morgan's substantiated conduct and behaviors. After the Tacoma News Tribune (TNT) made a public records request, Judge Morgan filed this suit to block the release of the Stephson Report.

The City had at least three reasons for initiating an investigation into the Municipal Court after this complaint was made, despite the City's lack of direct authority over the administration of the Municipal Court.

These interests are independent of, and in addition to, the Municipal Court's own interest in investigating any such claim.

First, the City has a direct financial interest because the Municipal Court is funded by the City. The City will bear the brunt of any liability imposed on the Municipal Court, so the City has an interest in knowing how the Court is being run.

Second, the City has an interest because it can take some remedial actions to avoid or minimize any liability, even though it has no direct authority over Judge Morgan and how he runs the Municipal Court. Specifically, the City could remedy the claim, if sustained, by offering the complaining employee an equivalent position in the City outside of the Municipal Court and thus outside of Judge Morgan's authority. This interest is reflected in the City's Anti-Harassment Policy, which the City treated as mandating that it conduct an investigation in this case.

Third, the City had an interest in investigating the claim to help the City assess whether it should continue to maintain a municipal court. At the end of 2007, one of the two judges at the Municipal Court resigned after it was revealed she was having an affair with an attorney that regularly appeared before her. Thus, when the City learned of a complaint about a hostile work environment at the Municipal Court, it had reason to reassess its decision eight years ago in 2000 to create the court in the first place.

Accordingly, despite the City's lack of authority over the administration of the Court, the City had a strong interest in knowing exactly what was behind the hostile work environment claim. And that is why the City itself hired Ms. Stephson to investigate and prepare the Stephson Report.

The Stephson Report is a City record subject to the PRA because the City initiated the Stephson investigation pursuant to its Anti-Harassment Policy to protect the City's interests, and it directed Ms. Stephson to prepare her report without Judge Morgan's approval after he tried to stop the investigation.

No exemption under the PRA required the City to withhold the Stephson Report. The report is not an attorney-client privileged document because Ms. Stephson was acting as an investigator, not an attorney, when she prepared the report.

The Stephson Report is not work product because it was prepared in the normal course of business pursuant to the City's Anti-Harassment Policy.

The Stephson Report is not exempt under the *Bellevue John Does*¹ case because the report documents Judge Morgan's substantive conduct and behaviors.

The Stephson Report is a City record subject to the PRA, and not exempt from disclosure. Accordingly, this Court should affirm the trial court, vacate the stay and allow the City to produce the report to the TNT.

¹ Bellevue John Does v. Bellevue School Dist., -- Wn.2d --, 189 P.3d 139 (2008).

The City's cross-appeal concerns the trial court's ruling denying the City its attorney fees. This case started with Judge Morgan obtaining an ex-parte temporary restraining order (TRO). To obtain the order, Judge Morgan's counsel informed the Commissioner that the City had notice and had elected not to attend. This was false – no notice had been given. The trial court ultimately vacated the order as wrongfully issued, but then denied the City its attorney fees by adopting a rule that effectively barred attorney fees in all PRA cases where TROs are wrongly issued. This absolute bar is contrary to the Supreme Court's own rulings, and thus the trial court abused its discretion in denying fees on this basis.

2. RESTATEMENT OF ISSUES ON MORGAN APPEAL

- 2.1 Separation of Powers and GR 29(f). The City initiated the Stephson investigation to protect its own interests. Judge Morgan never authorized the Stephson Report, and the City had it prepared after Judge Morgan tried to stop the investigation. This makes the report a public record of the City subject to the PRA. Does GR 29 prohibit the City from protecting its interests when the City can protect those interests without interfering with the administrations of the Municipal Court?
- 2.2 Attorney-Client Privilege. The City hired Amy Stephson to conduct a factual investigation, not to serve as an attorney. The Stephson Report contains no legal analysis or legal recommendations. Is the Stephson Report an attorney-client communication?
- 2.3 Work Product. The City had the Stephson Report prepared in the normal course of business pursuant to the City's Anti-Harassment Policy. It was not prepared in anticipation of litigation. In light of the City's reasons for

having the Stephson Report prepared, does the Stephson Report qualify as work product?

2.4 Sealed document. Judge Morgan forwarded an email from the City Attorney concerning the Stephson investigation to a Federal Way city councilmember. The councilmember had no role in the investigation. In light of these facts, is the email still privileged?

3. ASSIGNMENTS OF ERROR ON CROSS-APPEAL

- 3.1 The Commissioner erred in issuing a TRO when no effort had been made to provide the City of Federal Way with notice.
- 3.2 The Court erred in adopting a ruling that effectively bars the award of attorney fees in any PRA case where a TRO was wrongly issued.
 - 3.3 The Court erred in not awarding the City its attorney fees.

4. STATEMENT OF ISSUES ON CROSS-APPEAL

To obtain a TRO, Judge Morgan informed the Commissioner that the City of Federal Way had notice of the hearing, even though this was not true. Judge Prochnau subsequently vacated the TRO that had prevented the City from releasing the Stephson Report. The Supreme Court has held that attorney fees can be awarded for a wrongly issued injunction in a PRA case. Did the trial court err when it effectively adopted a total bar on attorney fees in PRA cases and when it denied the City its attorney fees?

5. STATEMENT OF THE CASE

5.1 The City Receives a Complaint of a "Hostile Work Environment" at the Municipal Court

In January 2008, the City hired attorney Amy Plenefisch to investigate alleged misconduct that occurred at an unofficial Municipal Court holiday party and to provide guidance to the City. CP 70 ¶3. This investigation and legal advice is summarized in the "Plenefisch Report." CP 70; 179-87 ¶3. The events at the holiday party resulted in the resignation of a judge and the court administrator. CP 70 ¶3.

During the Plenefisch investigation and after an employment assistance program ("EAP") session for all Municipal Court clerks, a Municipal Court employee complained to the City about hostile work conditions at the Municipal Court. CP 70-71 ¶4.

5.2 The City Initiates an Investigation of the Complaint Pursuant to the City's Anti-Harassment Policy

5.2.1 <u>The City Anti-Harassment Policy mandates an investigation.</u>

The City's Anti-Harassment Policy requires the City to investigate a hostile work environment claim. Sub 44.² Once the City learned about the complaint about the Municipal Court, pursuant to its policy, the City initiated an investigation. CP 70-71 ¶4.

² The "sub" references are to sub numbers in the Superior Court docket. The City has filed a supplemental designation of clerks' papers and will file a substitute brief with proper CP cites once they are available.

5.2.2 The City seeks Judge Morgan's cooperation but elects to proceed with hiring an investigator without Judge Morgan's approval.

The allegation of a hostile work environment was first raised to the City on January 17, 2008. CP 71 ¶5. The allegation, pursuant to the policy, was directed to the City's Human Resources Department. CP 70-71, ¶¶4-5; Sub 44. That same day the City Attorney informed Judge Morgan that she could retain an investigator for the investigation if Judge Morgan did not object. CP 189 Ex. 2. On January 22, 2008, when Judge Morgan had still not responded, the City elected to hire Ms. Stephson and notified Judge Morgan. CP 71 ¶5; 191. Judge Morgan then consented. CP 11.

5.2.3 The engagement of Amy Stephson differs from the earlier Plenefisch investigation.

Unlike when the City hired Ms. Plenefisch to investigate the holiday party incident and provide the City with legal advice, the City hired Ms. Stephson solely to investigate facts, not to provide legal advice. CP 70-71 ¶4. The two investigations involve entirely different events and facts. The only "relationship" between the two events is that the hostile work environment claim was raised during an EAP held in the aftermath of the holiday party investigation. Compare CP 161-74 with CP 179-87; RP (March 14 Decision) at 6:3-13 (trial court describing differences between the two reports). Not only are the facts different, but the two

reports serve two entirely separate purposes. The Plenefisch Report included legal analysis and legal recommendations. CP 183-87. The Stephson Report only contains a factual summary of her investigation – it did not contain any legal analysis or legal recommendations. CP 161-74.

5.3 Judge Morgan Seeks to Terminate the Investigation

5.3.1 Judge Morgan is offended by the investigator.

As part of her investigation, Ms. Stephson interviewed Judge Morgan on February 5. CP 71 ¶7; 172. Later that afternoon, a Municipal Court clerk called Ms. Stephson and told her Judge Morgan had questioned her about the investigation. CP 71 ¶7; CP 172-73. After unsuccessfully trying to contact the City Attorney, Ms. Stephson called Judge Morgan to warn him not to talk to anyone about the investigation. CP 71 ¶7; 173. Following this call, Judge Morgan tried to stop the investigation. CP 70 ¶7; 173, 195, 198.

Judge Morgan's emails display his attitude towards Ms. Stephson – he thought she was only acting as an investigator, not an attorney. First, during and after the Stephson investigation, Judge Morgan regularly referred to Ms. Stephson as "the investigator" – not as an attorney. (E.g.,

³ The event is detailed on pages 12 and 13 (CP 172-73) of the Stephson Report. The only other reason Judge Morgan gave at the time for trying to stop the investigation was that he did not think anyone besides the CJC could investigate a claim about his own actions. CP 173; see also CP 195, 198.

CP 195, 216) Second, he considered Ms. Stephson's investigation an "independent investigation" into his conduct. CP 98. Third, one of his explanations about why he sought to terminate the investigation shows that he thought Ms. Stephson was only performing an administrative function, and it was improper for her to "offer[] unsolicited advice" or even contact Judge Morgan except during the scheduled interview. CP 198. In one of these emails he complained directly to Ms. Stephson:

I agreed to an independent investigation and the independence of this investigation was compromised when you . . . inserted yourself on your own initiative into a workplace matter.

RP (3/19 Argument) at 33:5-9 quoting Feb. 08, 2008 email from Morgan to Stephson (CP 198, sealed document 9). In another, Judge Morgan explained to his bailiff:

As you know, I received a call from the investigator admonishing me from having what I considered a brief and innocent conversation with a clerk. From my perspective, investigators are empowered to investigate but are not in the position of offering unsolicited directives to managers on how to manage their workplace. i [sic] believe the investigator overstepped her authority[.]

CP195 (formerly sealed document 8). Judge Morgan made a similar comment to the City Attorney, which is quoted in Section 2 of the City's Proposed Supplemental Memorandum Filed Under Seal. Nothing in

Judge Morgan's contemporaneous emails suggest Judge Morgan thought

Ms. Stephson was acting as an attorney.⁴

5.3.2 The City directs the investigator to prepare her written report without Judge Morgan's approval.

Ms. Stephson prepared her report for the City, not the Municipal Court. Judge Morgan never authorized the Stephson Report and was not aware it had even been prepared until February 25, 2008. CP 11. Notwithstanding the lack of Judge Morgan's approval and his efforts to stop the investigation, the City Attorney instructed Ms. Stephson to complete her work by preparing her report. CP 71 ¶8. She had already concluded interviews, so the City no longer needed Judge's Morgan's permission to speak with Municipal Court employees. CP 71 ¶8. The report itself notes that Judge Morgan instructed Ms. Stephson to stop the investigation. CP 173 (page 13 of the Stephson report).

⁴ In his emails, Judge Morgan expressly states that there were two reasons he sought to terminate the investigation: (1) he was offended by Ms. Stephson's actions, and (2) he thought only the CJC could investigate him. CP 195, 198. In his appellate brief, Judge Morgan again asserted that there were two reasons, but fails to even mention the first reason related to Ms. Stephson. Morgan Br. at 9-10; Morgan Sealed Br. ¶1. Instead he has come up with a third reason, that the administrator he thought was the subject of the investigation was going to resign. It is not surprising that Judge Morgan fails to mention the true first reason, however, because the fact that he was offend by Ms. Stephson offering advice undercuts his assertion that she was acting as an attorney.

5.4 Judge Morgan Obtains an Ex-Parte Injunction Without Making Any Effort to Notify the City

After receiving a public records request for the Stephson Report from the Tacoma News Tribune on February 22, 2008, the City informed Judge Morgan that the City would release the report on March 6, 2008, unless Judge Morgan obtained an injunction. CP 72 ¶10. Judge Morgan's counsel and the City exchanged over six letters over the next several days, including four letters on March 4, 2008. CP 72¶10, 278-79.

Despite this extensive correspondence, Judge Morgan obtained an ex parte injunction on March 5, 2008, without giving notice to the City, in direct violation of CR 65(b)(c). CP 49 ¶4.9, 72 ¶10; RP (3/19 Argument) 30:13-18; RP (3/19 Decision) at 5:17-23. Judge Morgan was only able to obtain the TRO by expressly assuring the Commissioner that he had provided notice and the City had affirmatively chosen not to attend the hearing:

Court: ... so the state – the City of Federal Way doesn't have notice of this?

Mr. Dunham (counsel for Judge Morgan): No - Yeah they do. They do.

Court: Okay.

Mr. Dunham: They said – they said file by today or we'll release this stuff tomorrow, and we told 'em we'd file today.

Court: Okay. And did you tell them you're going to be here requesting this restraining –

Mr. Crane (counsel for Judge Morgan): Yes sir.

Mr. Dunham: Yes.

Court: -- order today? And they didn't choose to send an

attorney?

Mr. Dunham: No.

RP (3/5) at 20. Neither attorney Dunham or Crane, nor Judge Morgan, had provided the City with notice of the TRO hearing. CP 49 ¶4.9, 72 ¶10.

Judge Morgan's actions at the later, March 19 hearing show that this was not simply an oversight. At that hearing, the City objected to the lack of notice and the trial court noted that there was no CR 65(b) certification. RP (3/19 Argument) at 30:13-18. Rather than explain his actions, Judge Morgan's legal team remained silent and did not explain that they had represented to the Commissioner that notice was given.

As a result of these misrepresentations, the Commissioner issued an extensive restraining order that did significantly more than simply set a show cause hearing. First, the order disqualified the City Attorney from representing the City of Federal Way. CP 42 ¶8. This forced the City to expend taxpayer funds to hire outside counsel. Second, it required the City to submit records for *in camera* review. CP 42 ¶3. Third, it restrained the City from releasing the Stephson Report. CP 41-42 ¶1.

Fourth, the order set an expedited hearing for March 19. CP 42 ¶6. The City complied with all aspects of this order.

5.5 Judge Prochnau Vacates the Improper Injunction and Orders Certain Documents Sealed

At the hearing on March 19, the trial court heard argument from Judge Morgan, the City and the TNT, who had intervened. Based on the record before her, the trial court made several findings and vacated the protective order.

Although ruling that the City Attorney was acting on behalf of both the City and the Municipal Court when she hired Ms. Stephson to investigate, the trial court also found that the City initiated the investigation based on its Anti-Harassment Policy. RP (3/19 Decision) at 8:8-24. In making this finding, the trial court rejected Judge Morgan's argument that the City Attorney had hired Ms. Stephson exclusively on behalf of the Municipal Court. The trial court also rejected Judge Morgan's argument that because General Rule 29 may prohibit the City from taking any action on an investigative report, the City could not investigate allegations of a hostile work environment. RP (3/19 Decision) at 7:18-25, 8:15-24. The trial court recognized that the City was proceeding under its established policy: "Now that may be contrary to the general rules of the court [to apply the city policy to the court] but that

[the Anti-Harassment Policy] is certainly what the city attorney was proceeding on[.]" RP (3/19 Decision) at 8:18-20.

Judge Prochnau further ruled that "Ms. Stephson was not acting as an attorney for either the city or the Municipal Court during the course of her investigation." RP (3/19 Decision) at 10:18-20. In making this ruling, the trial court stressed that Judge Morgan himself "clearly treated her as an investigator and not an attorney when he rebuked her for her unsolicited advice[]". RP (3/19 Decision) at 10:21-23. Judge Prochnau also noted that the Stephson Report lacks any legal analysis or conclusions. RP (3/19 Decision) at 11:4-24.

Because Ms. Stephson was not acting as an attorney, the Court found the attorney-client privilege did not apply. RP (3/19 Decision) at 11:21-23. The Stephson report was not work product because the City had the report prepared pursuant to its Anti-Harassment Policy to address the complaint. RP (3/19 Decision) at 12:17-13:22. Even if the report would have had some use in litigation, under the "Independent Purpose" Doctrine it would still be subject to disclosure because the primary independent purpose was not to prepare for litigation. RP (3/19 Decision) at 14:20-16:5.

And the Court ruled that Judge Morgan could not satisfy the heightened standard in RCW 42.56.540 for injunctions. RP (3/19

Decision) at 16:6-17:3. An order confirming her oral ruling was entered on March 26, 2008. CP 101-03.

5.6 The Trial Court Denies the City's Request for Fees

After Judge Prochnau vacated the TRO, the City requested its attorney fees incurred in dissolving this wrongly issued TRO. Sub 46; Sub 64. The trial court denied fees by ruling that because "a trial on the merits would have been fruitless if the records had already been disclosed," it would not award attorney fees. Sub 69. This is the case in any third-party PRA case, and thus the trial court effectively adopted a blanket rule that attorney fees could not be awarded for wrongfully issued injunctions in all cases.

6. SUMMARY OF ARGUMENT IN RESPONSE TO MORGAN APPEAL

This Court should affirm the trial court because (1) the Stephson Report is a city record, subject to the PRA, not exclusively a Municipal Court record; (2) the Stephson Report is not privileged because Ms. Stephson was not acting as an attorney; (3) the Stephson Report is not work product because it was prepared in the ordinary course of business pursuant to the City's Anti-Harassment Policy; and (4) the Stephson Report is not exempt under *Bellevue John Does* because it identifies substantiated conduct and behaviors.

The Stephson Report is a City record subject to the PRA because the City had the report prepared to protect its own interests, independent from the Municipal Court's interests. The facts show that (1) the City had a strong independent interest in conducting the investigation, (2) the City hired Ms. Stephson without waiting for approval from Judge Morgan and (3) the City had Ms. Stephson prepare her report without Judge Morgan's approval after he tried to stop the investigation. These facts demonstrate that the City prepared the report, used the report and owned the report, making it a public record.

The Stephson Report is not exempt from disclosure as an attorney-client communication. The facts show that although Ms. Stephson was an attorney, she was hired as an investigator, not an attorney. Judge Morgan's own emails show that he knew she was only acting as an investigator. In fact, when Ms. Stephson cautioned him after he talked to a court employee about the investigation, Judge Morgan tried to stop her investigation because he thought it was beyond her role as the "investigator" to offer advice. Because she was not acting as an attorney, her report is not privileged.

The Stephson Report is not exempt from disclosure as work product. The City had the report prepared in the ordinary course of business, pursuant to its Anti-Harassment Policy. In was in fact prepared

specifically to be disclosed because the investigation was part of the City's remedial duties. Should it be sued for the hostile work environment claim, one of the City's defenses would be that it promptly investigated the claim and took any necessary remedial action. To maintain this defense, it would have to disclose the report. Thus, the City prepared the report in part to avoid litigation, not in anticipation of litigation, so the report is not work product.

Further, the Stephson Report is not exempt from disclosure under the Supreme Court's recent opinion in *Bellevue John Does*. There, the Supreme Court held that records concerning unsubstantiated accusations against teachers about sexual misconduct with students were exempt from disclosure. But if the records "identify any substantiated allegation," it has to be disclosed. Here, the Stephson Report details Judge Morgan's substantiated conduct and behaviors. Thus, under *Bellevue John Does*, the Stephson Report is not exempt.

The Stephson report is a City record, subject to the PRA, and no exemption under the PRA applies that prevents the City from disclosing the record.

7. ARGUMENT ON MORGAN APPEAL

7.1 The Stephson Report Is a City Document and a Public Record

The PRA defines "public records" broadly to include "[1] any writing [2] containing information relating to the conduct of government or the performance of any governmental or proprietary function [3] prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." RCW 42.56.010(2).

Here, there is no dispute that the Stephson Report is a "writing" and that it contains information "relating to the conduct of government." Moreover, the facts show the City prepared, owned, used and retained the Stephson Report, making the report a public record.

The City had grounds independent of the Municipal Court for investigating the hostile work environment claim. It hired Ms. Stephson without waiting on Judge Morgan's consent. And it had Ms. Stephson prepare her report without Judge Morgan's approval after he tried to stop the investigation. These facts make the Stephson Report a City record.

Judge Morgan claims that the Stephson Report is not a "public record" subject to the PRA because the report was – or should have been under GR 29 – prepared exclusively for the Municipal Court, and thus is a "court record." Washington courts have held that "court records," which included case files and administrative records, are not subject to disclosure

under the PRA because "courts" are not "local agencies." See *Nast v. Michaels*, 107 Wn.2d 300, 305-06, 730 P.2d 54 (1986); *Spokane & Eastern Lawyers v. Tompkins*, 136 Wn. App. 616, 622, 150 P.3d 158 (2007); *Beuhler v. Small*, 115 Wn. App. 914, 918, 64 P3d 78 (2003).

But, because the City had its own reasons for initiating the Stephson investigation and had the Stephson Report prepared over Judge Morgan's objections, the Stephson Report is a City record.⁵

7.1.1 The City initiated and carried out the investigation on behalf of the City, which makes the Stephson Report a City record, subject to the PRA.

The crux of this case is factual: is the Stephson Report a City record subject to the PRA or is it exclusively a court record, not subject to the PRA? The issue is resolved by the well-established inquiry: did the City itself ever "prepare[], own[], use[], or retain[]" a copy of the Stephson Report? If the City prepared or owned or used or retained the report, the report is a public record, subject to disclosure under the Public Records Act (PRA) unless exempt. RCW 42.56.010(2). But if the report is exclusively a Municipal Court record, then it is not subject to disclosure because courts and court records are not subject to the PRA.

⁵ The Stephson Report may also be a court record, but this does not relieve the City from producing the City's copy.

Washington courts, applying the broad disclosure mandate of the PRA, have been expansive in finding that documents are public records when prepared, owned, used or retained by public agencies. See Concerned Rate Payers Ass'n v. PUD No. 1, 138 Wn.2d 950, 958-59 & n.9, 983 P.2d 635 (1999) (describing broad scope of PRA and categorizing precedent). Even when a record is not prepared or owned by an agency, it will still be a public record "if it is applied to a given purpose or instrumental to an end or process." Concerned Ratepayers, 138 Wn.2d at 959 (holding blueprint reviewed and rejected by PUD was used by the PUD and thus was a public record).

Here, the record clearly shows (1) the City had independent grounds for conducting the Stephson investigation even if GR 29 limited its ability to act (RP (3/19 Decision) at 13:7-22; CP 278-79); (2) the City instigated the investigation pursuant to its own Anti-Harassment Policy and hired Ms. Stephson before Judge Morgan approved (CP 70-71 ¶¶4-5); and (3) the City instructed Ms. Stephson to prepare her report without Judge Morgan's approval after he tried to stop her investigation. CP 11, 71 ¶8. These facts show the Stephson Report was prepared, used, owned and retained by the City, making the report public record subject to the PRA.

The City had at least three compelling interests to conduct the Stephson investigation. First, the City has a direct financial interest. This is because the Municipal Court is funded by the City, so the City would be financially liable for the Municipal Court's actionable conduct.⁶

Second, the City could have taken actions pursuant to its Anti-Harassment Policy to remedy any improper conduct to limit its liability, even if Judge Morgan refused to cooperate and allow the City to take any direct actions in the Municipal Court. If the complaint was well-grounded, the City could fulfill its remedial duties by offering the complaining employee a job elsewhere in the City outside of the Municipal Court and away from Judge Morgan. See, e.g., Bouton v. BMW of N. Am., 29 F.3d 103, 107 (3d Cir. 1994) (employer's remedial action of transferring complaining employee to new position and supervisor sufficient to relieve employer of liability); Nash v. Electrospace Sys., Inc., 9 F.3d 401, 404 (5th Cir. 1993) (employer's transfer of complaining employee was remedial, not retaliatory, and thus supported employer's defense). It could offer an alternate position within the City without

⁶ Judge Morgan's "insurer" analogy is a red herring. First, the Municipal Court is part of the City. Second, even if the City's only interest was that of an insurer, the City still has an interest in using the report to evaluate its exposure. Once the City used the report, it became a public record. *See*, *e.g.*, *Concerned Ratepayers*, 138 Wn.2d at 959 (holding blueprint reviewed and rejected by PUD was used by the PUD and thus was a public record).

approval from Judge Morgan, and thus Judge Morgan's GR 29 argument (discussed in more detail below) is simply irrelevant.

Third, the City had an interest in investigating the claim against the presiding judge to help the City assess whether it should continue to maintain a municipal court at all. See City of Spokane v. County of Spokane, 158 Wn.2d 661, 146 P.3d 893 (2006) (discussing the city's plenary authority to determine the existence of city municipal courts). At the end of 2007, one of the two judges at the Municipal Court resigned after it was revealed she was having an affair with an attorney that regularly appeared before her. Thus, when the City learned of a complaint against the Municipal Court's other judge, Judge Morgan, it had reason to reassess its decision in 2000 to create the court in the first place. The City's Proposed Supplemental Memorandum Filed Under Seal details the problems at the Court that might lead the City to abandon the court.

The City's correspondence with Judge Morgan shows that the City was protecting its own interests in hiring Ms. Stephson to conduct the investigation:

• the City only asked Judge Morgan if he objected⁷ to the investigation, it did not ask his permission. CP 189.

⁷ The City asked Judge Morgan if he objected only because Judge Morgan had previously blocked the City from investigating a complaint made against him by a court employee. CP 71 ¶6; CP 271.

- the City informed Judge Morgan that the investigation was the best defense for the Court and for the City. CP 189.
- the City lined up Ms. Stephson to conduct the investigation before Judge Morgan agreed to cooperate. CP 191.
- when Judge Morgan first objected to the release of the Stephson Report, the City explained that the report was prepared both for the Municipal Court's and the City's defenses. CP 279.

Finally, the City's actions after Judge Morgan tried to stop the investigation shows that the City had the Stephson Report prepared for its own interests, not just the Court'. First, Judge Morgan never authorized the report. CP 11. Second, as reflected in the Stephson Report itself, Ms. Stephson prepared the report for the City after Judge Morgan instructed her to stop her work. CP 173. After Judge Morgan directed her to stop, the City instructed her to finish her work – because the report was for the City. CP 71 ¶8. This fact alone shows that the report was prepared for the City, not the Municipal Court. This conclusion is reinforced by an incident the year before, where Judge Morgan refused to allow the City to investigate a complaint. CP 71 ¶6; 271. In that prior incident, where the City was acting exclusively for the Municipal Court, it followed Judge Morgan's directions. But here, when the City was acting (at least in part) to protect its own interest, it had Ms. Stephson finish her report despite Judge Morgan's objection.

In summary, the City acted independently in its investigation of the hostile work claim to protect its own interests. The City hired Ms. Stephson without waiting for Judge Morgan's approval and had her prepare her report over Judge Morgan's objections.

Because the report was prepared for the City and the City used the Stephson Report, the report is a City document. And because it is a City document, it is a public record, subject to disclosure under the PRA.

7.1.2 Even if the investigation could have been conducted by the Municipal Court pursuant to General
Rule 29, in this case, the City – not the Municipal
Court – conducted the investigation.

City enactments, like state law and enactments, are presumed valid. *City of Wenatchee v. Owens*, -- Wn. App. --, 185 P.3d 1218, 1220-21 (2008). Appellant has the burden to invalidate the application of City policy, in their entirety, as they may apply to a municipal court. But the scope of GR 29 does not reach so far as to invalidate City policies that on their face give the City the power to investigate claims of wrongful hostile workplace.

Even assuming that Judge Morgan is correct as to the scope of GR 29, that does not change what happened in this case. This Court must determine if the Stephson Report is a public record based on what <u>actually</u> happened, not what <u>should</u> have happened. *See Soter v. Cowles Publ'g*

Co., 131 Wn. App. 882, 893, 130 P.3d 840 (2006) ("Soter P") (refusing to determine whether document was exempt based on what the appellant argued "should have" happened; instead basing its ruling on what actually happened), aff'd 162 Wn.2d 716, 174 P.3d 60 (2007). Even if the Court were to assume that the City should not have investigated the hostile work claim, the simple fact is that the City did conduct the investigation. Judge Morgan's arguments about what should have happened might be relevant if this was a mandamus action seeking to stop the investigation. But it has no relevance in this case, where the City has already completed its investigation and this Court is simply seeking to determine what actually happened. And what actually happened is that the City conducted the investigation to protect its own interests. RP (3/19 Decision) at 13:7-22.

Moreover, Judge Morgan's arguments are simply wrong. As the law provides, the City could take remedial actions by offering the complaining employee a new position outside of the Municipal Court. Nothing in GR 29 prevents the City from taking such action.

7.1.3 By agreeing to allow the City to investigate, Judge Morgan waived any objections he may have had to the City creating records about its investigation.

Finally, Judge Morgan waived any GR 29-based complaint when he expressly agreed to allow the City investigator to investigate the claims. The City Attorney's January 17 memo to Judge Morgan makes it clear the City is seeking to protect the City's and the Municipal Court's interests.

CP 189. This gave Judge Morgan notice that the City was at least in part conducting the investigation for the City's distinct interest.

Judge Morgan was on further notice based on the January 22, 2008 email from the City Attorney where she stated she had not waited for Judge Morgan's approval and had already hired an investigator. CP 191. Here, the City's unilateral action is particularly significant. Just one year earlier, when the City had received a complaint, Judge Morgan had refused to cooperate with the City, so the City had taken no action. CP 71 ¶6; 271. If the City Attorney was only acting on behalf of the Municipal Court in the present case, its past actions show it would not have proceeded without Judge Morgan's approval.

Despite notice that the City was conducting the investigation to protect its own interests, Judge Morgan agreed to allow the investigation to proceed. This affirmative agreement waives any complaints based on GR 29 about the City creating records that are subject to disclosure.

7.2 The Stephson Report Is Not Exempt From Disclosure Based on the Attorney-Client Privilege or the Work Product Doctrine

Ms. Stephson's investigation and her report were conducted and prepared pursuant to the City's Anti-Harassment Policy as part of the City's duty to promptly investigate a claim of hostile work environment.

Ms. Stephson was not hired to provide, nor did she provide, any legal advice. The City hired her in the hopes of avoiding any litigation, not in anticipation of litigation. As such, her report is not exempt from disclosure based on these two doctrines.

7.2.1 To determine whether a record is exempt from disclosure, the Court must look at why the record was created. If it was not prepared to provide legal advice or prepared for litigation, the record is not exempt from disclosure.

Courts and commentators have repeatedly noted that the mere fact that a document was prepared by an attorney does not mean the document is automatically protected by the attorney-client privilege. Nor does the fact an event might lead to litigation mean that every record that relates to the event is created in anticipation of litigation.

"The essence of the attorney/client relationship is whether the attorney's advice or assistance is sought and received on legal matters." Bohn v. Cody, 119 Wn.2d 357, 363, 832 P.2d 71 (1992). "Communications between an attorney and client are **not** privileged if the attorney is simply giving business or financial advice, as opposed to legal advice." Karl Tegland, 5A Wash. Prac., Evidence Law and Practice, § 501.15 (2007) (emphasis original); see also 1 McCormick on Evidence §88 & nn. 6-14 (2007) (noting different roles attorneys play where privilege does not apply and citing cases).

The work product doctrine also has a limited application. A document must be created in reasonable anticipation of litigation to be exempt as work product. *Soter v. Cowles Publ'g Co.*, 131 Wn. App. 882, 893, 130 P.3d 840 (2006) ("*Soter P*"), *aff'd* 162 Wn.2d 716, 174 P.3d 60 (2007). Time and again, the Supreme Court has refused to broadly apply the exemption to protect documents from public disclosure requests. *See, e.g., Hangartner v. City of Seattle*, 151 Wn.2d 439, 449-50, 90 P.3d 26 (2004) (rejecting "litigation-charged atmosphere" test); *Dawson v. Daly*, 120 Wn.2d 782, 290-91, 845 P.2d 995 (1993) (rejecting "relevant to a controversy" test). "The work product doctrine does not shield records that a party would have generated pursuant to 'ordinary course of business' administrative procedures even without the prospect of litigation." *Soter I*, 131 Wn. App. at 896.

In reviewing a nearly factually identical case, the Supreme Court of New Jersey held that an investigative report created in response to a complaint of harassment, prepared by an attorney pursuant to the Turnpike Authority's anti-harassment policy, would not be protected by the attorney-client privilege or work product doctrine where the report did not contain legal analysis. *Payton v. New Jersey Turnpike Authority*, 691 A.2d 321, 334, 336 (N.J. 1997) (a copy is attached to this brief).

In that case, the court looked at the content of the report, the existence of a policy requiring the investigation and the timing of the investigation – months before any lawsuit was filed. *Payton*, 691 A.2d at 334. The key factor was the defendant's purpose for preparing the report, not its content. "[I]f the purpose [of an investigation] was simply to enforce defendant's anti-discrimination policy or to comply with its legal duties to investigate and to remedy the allegations, then the [attorney-client] privilege does not apply." *Payton* 691 A.2d at 335. In rejecting a claim that litigation was reasonably anticipatable, the court expressly noted that "[a]lthough any internal sexual harassment complaint has the potential to balloon into a lawsuit, effective internal remediation is independently necessary and may prevent such an eventuality." *Payton*, 691 A.2d at 334.

Here, the City hired Ms. Stephson pursuant to its Anti-Harassment Policy to investigate facts, so the City could take remedial or other action. Her purely factual report was thus prepared in the ordinary course of business and is neither prepared to provide legal advice or in anticipation of litigation. That makes the Stephson Report subject to disclosure and not exempt as work product or an attorney-client communication.

7.2.2 The City hired Amy Stephson to conduct a Faragher/Ellerth investigation, not to act as an attorney.

The City hired Ms. Stephson to fulfill an administrative, human resources task of investigating a complaint, not to provide any legal advice. CP 70-71 ¶4. The City's policy governing workplace harassment specifically requires the City's human resources department – not its legal department - to investigate complaints of harassment and hostile work environment. Sub 44. By conducting an administrative investigation, the City is seeking to prevent harassment and to comply with case law that makes an employer - the City - automatically liable for a supervisor's discriminative conduct unless the employer has an Anti-Harassment Policy, it promptly conducts an investigation of any claims, and takes prompt remedial action. See RP (3/19 Decision) at 13:7-22. See also, e.g., Sangster v. Albertson's, Inc., 99 Wn. App. 156, 164-65, 991 P.2d 674 (2000) (quoting Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998) and Faregher v. City of Boca Baton, 524 U.S. 775 (1998)). The administrative purpose of Ms. Stephson's investigation and report is made clear not only by the City's policy, but also by the report itself, which lacks significant legal analysis.

Here, like in the *Payton* case, all the facts show that the Stephson Report is not a privileged communication. As in *Payton*, the City was

seeking to follow its Anti-Harassment Policy when it hired Ms. Stephson to investigate the claims of a hostile work environment at the Municipal Court. CP 70-71 ¶4. And as in *Payton*, the City hired Ms. Stephson immediately after learning of the complaint, before any litigation had even been threatened. CP 47 ¶2.15. It did not hire her to provide legal advice, and her report is simply a factual account of her investigation. CP 70-71 ¶4. Thus, the Stephson Report is not protected by anyone's attorney-client privilege.

7.2.3 <u>Judge Morgan's contemporaneous emails show he</u> thought Ms. Stephson was acting as an investigator, not an attorney.

The most telling evidence showing Ms. Stephson was not acting as an attorney comes directly from Judge Morgan himself. Rather than treating Ms. Stephson as an attorney, Judge Morgan was offended when Ms. Stephson took actions Judge Morgan thought an investigator should not take. Judge Morgan's email to his bailiff is representative about his attitude. In that email, he complains about how Ms. Stephson "admonished" him about speaking with one of the clerks about the investigation. CP 195. This was improper, he asserts, because "From my prospective, investigators are empowered to investigate but are not in the position of offering unsolicited directives to managers[.]" CP 195. He goes on to explain that, "i [sic] believe the investigator overstepped her

authority and this is one of the reasons I am directing this particular investigation to end." CP 197.

Judge Morgan's other emails to Ms. Stephson and the City Attorney include similar complaints about Ms. Stephson. CP 198, 215-16. These emails show objectively what Judge Morgan thought contemporaneous with the Stephson Report. He may now assert that he thought she was his attorney, but this after-the-fact assertion is directly refuted by his earlier words and was properly discounted by the trial court.

7.2.4 <u>The Stephson Report does not contain any legal</u> advice.

The content of the Stephson Report also demonstrates the limited, non-legal role the City hired Ms. Stephson to play. This is particularly true when the report is compared with the earlier Plenefisch Report.

The Plenefisch Report is marked as an "attorney-client" communication. CP 179. The Stephson Report is not.⁸ CP 161. Beyond a factual summary, the Plenefisch Report includes legal analysis and recommendations. CP 183-87. The Stephson Report contains only factual summaries. E.g., CP 173. It has no legal analysis. It contains no recommendations. The only "conclusions" in the Stephson Report are

⁸ The Stephson Report is marked "Privileged and Confidential" but that is because under chapter 49.30 RCW, employment investigations are confidential until completed. See RCW 42.56.250(5).

factual conclusions on issues of credibility – none are legal in nature. Because the report only contains a factual summary of what occurred, it does not qualify as an attorney-client communication. See Karl Tegland, 5A Wash. Prac., Evidence Law and Practice, § 501.15 (2007) ("Communications between an attorney and client are *not* privileged if the attorney is simply giving business or financial advice, as opposed to legal advice.") (emphasis original)

7.2.5 The Stephson Report was created in the ordinary course of business, not in anticipation of litigation.

The analysis of whether the Stephson Report was work product turns on the City's purpose for creating the report, not who created it. If the City "would have generated [the report] pursuant to 'ordinary course of business' administrative procedures even without the prospect of litigation" then the document is not work product." *Soter I*, 131 Wn. App. at 896 (quoting *Heidebrink v. Moriwaki*, 104 Wn.2d 392, 399, 706 P.2d 212 (1985)). The fact that a "complaint has the potential to balloon into a lawsuit" does not mean an investigation carried out pursuant to a company policy to prevent a lawsuit is work product. *Payton*, 691 A.2d at 334. If the true purpose is to comply with the policy and take prompt remedial action, then the document would not be protected work product. *Payton* 691 A.2d at 334-35; see also *Soter I*, 131 Wn. App. at 899 ("While

litigation may have been anticipated, the witness reports were gathered by the sheriff in the course of an internal investigation and that was mandated" by police policy and was not work product) (citing *Collins v. Mullins*, 170 F.R.D. 132, 133, 137 (W.D. Va. 1996)).

Here, the City hired Ms. Stephson in the ordinary course of business to conduct an investigation mandated by City administrative policy that would have been conducted whether or not a lawsuit was threatened. CP 47 ¶2.15, 70-71 ¶4. Thus, her report is not work product.

The facts in this case are dramatically different from the facts in *Soter*, making Judge Morgan's reliance on that case misplaced. In *Soter*, because the investigation was of a student death, the school district could not have provided any remedial action to avoid a legal claim. Thus, the only logical purpose was to prepare for litigation. Here, in contrast, the City was not in a dire legal position and it could provide prompt remedial

⁹ The key issue was the intent of the entity ordering the investigation. In some cases, one person may have wanted to prepare for litigation, while another may have another motive. But in *Soter I*, the court "was not persuaded that an agency in the [defendant's] dire legal position would simply decide to delegate the preparation of internal, administrative investigation reports for nonlitigation purposes to lawyers instead of its own employees." *Soter I*, 131 Wn. App. at 899. Here, in contrast, the uncontradicted evidence shows the City Attorney, who hired Ms. Stephson, was seeking to comply with the City's policy and fulfill an administrative function. CP 70-71 ¶4. While another person in that same situation may have sought to prepare for litigation, that was not the case here.

actions to avoid litigation. RP (3/19 Decision) at 13:7-22. And the record shows that the City Attorney ordered the investigation to comply with the City's administrative policy. CP 70-71 ¶4. Thus, the trial court properly concluded that the City did not hire Ms. Stephson to prepare for litigation and her report was not work product.

7.3 The Bellevue John Does Case Mandates Disclosure of the Stephson Report Because the Report Details Judge Morgan's Substantiated Conduct and Behaviors

The *Bellevue John Does* case mandates that the City disclose the Stephson Report because the report details Judge Morgan's substantiated conduct and behaviors. Under that opinion, documents that identify "any" substantiated allegations must be disclosed. *Bellevue John Does v. Bellevue School Dist.*, -- Wn.2d --, 189 P.3d 139, 152 (2008). Moreover, even if that opinion did not mandate disclosure, the case at bar is factually distinguishable from *Bellevue John Does* because that case dealt with teachers, not an elected, presiding judge, and involved accusations of sexual assault on minors, not generic claims of a hostile work environment.

¹⁰ Although Judge Morgan did not raise RCW 42.56.230(2) as a basis for withholding the Stephson Report below, the Supreme Court has held that a party opposing disclosure may raise additional bases for exempting a record for the first time on appeal. *Progressive Animal Welfare Society v. University of Washington*, 125 Wn.2d 243, 253, 884 P.2d 592 (1995).

7.3.1 <u>In Bellevue John Does</u>, the Supreme Court only exempted records to protect teacher privacy.

In Bellevue John Does, the Court addressed whether documents related to accusations of teacher sexual misconduct should be released. As a general matter, the Court held that the identities of teachers accused of sexual misconduct with students are exempt from disclosure under RCW 42.56.230(2) when the claims are unsubstantiated. Bellevue John Does, 189 P.3d at 153. This section of the PRA exempts records that, if disclosed. would violate the employee's right privacy. RCW 42.56.230(2). An employee's right to privacy is only violated when (1) release of the record would violate the employee's right to privacy and (2) there is no legitimate public interest in the document. Bellevue John Does, 189 P.3d at 148. The Court's analysis of one subset of documents, the "letters of direction," provides additional details about when documents are actually exempt.

"Letters of direction" are letters given to teachers to guide them in their future conduct, and are given out when there is no actionable misconduct. *Bellevue John Does*, 189 P.3d at 153. The Court held that such letters had to be disclosed but identifying information about the teacher could be redacted "when such letters do not identify any substantiated allegations or impose any discipline." *Bellevue John Does*,

189 P.3d at 152. This is because the release of the records unredacted would harm the efficient function of government by chilling candor in the evaluation process and harming morale. *Bellevue John Does*, 189 P.3d at 152-53. Accordingly, there was no legitimate public interest (it was uncontested that disclosure of these documents would be highly offensive). *Bellevue John Does*, 189 P.3d at 152-53. But if the letter does identify any substantiated allegations, it must be disclosed unredacted because in that case, the public would have a legitimate interest. *Bellevue John Does*, 189 P.3d at 153.

7.3.2 The Stephson Report detailed Judge Morgan's substantiated conduct and behaviors, making it subject to disclosure under *Bellevue John Does*.

Under *Bellevue John Does*, a document can only be withheld if it does not contain "any" substantiated allegations. Here, the Stephson Report detailed Judge Morgan's substantiated conduct and behaviors. These are summarized in Section 3 of the City's Proposed Supplemental Brief Filed Under Seal. The public has a strong and legitimate interest in learning about the substantiated conduct and behaviors of their elected judge. Accordingly, under *Bellevue John Does*, the report is not exempt and must be disclosed.

Judge Morgan's assertion in his sealed brief that "all of the allegations, except those Judge Morgan explicitly admits, are

unsubstantiated and protected from PRA disclosure" is without legal support. See Morgan Sealed Br. at ¶6. However hard Judge Morgan may deny the claims, that does not make the report's finding "unsubstantiated." Judge Morgan is an elected official, and his constituents have a legitimate interest in how he runs his court and conducts himself with court personnel.

7.3.3 This case does not raise the same privacy interests at issue in *Bellevue John Does*.

Even if *Bellevue John Does* did not mandate disclosure here, two significant factual differences distinguish this case from *Bellevue John Does* and weigh strongly in favor of disclosing the Stephson Report.¹¹

First, Judge Morgan is an elected Judge and the chief executive officer of the Federal Way Courts. His only "performance evaluation" is when he is up for re-election and the voters can express their views by voting for or against him. The courts have recognized that the justifications for exempting disclosure of performance-related records for public employees does not apply to performance-related records for executive employees.

¹¹ Because Judge Morgan did not raise RCW 42.56.230(2) below, the factual record is sparse on this issue. Accordingly, if the Court agrees that the Stephson Report contains substantiated allegations, the Court should refrain from addressing the factual distinctions addressed in this section.

Performance-related documents are exempt because releasing those records would harm employee morale and discourage reviewers from giving candid reviews if they knew their investigation would be made public. *Bellevue John Does*, 189 P.3d at 152. This harm to the public outweighs the public's interest in reviewing performance-related records. *Bellevue John Does*, 189 P.3d at 152. Thus, under RCW 42.56.230(2), such records are exempt. *Bellevue John Does*, 189 P.3d at 152.

But when the issue is the performance of an executive officer such as a city manager or police chief, there is a different balance and RCW 42.56.230(2) does not exempt such records. First, the details of an executive officer's performance are "a legitimate subject of public interest and debate." Spokane Research & Defense Fund v. City of Spokane, 99 Wn. App. 452, 457, 994 P.2d 267 (2000); see also Columbia Publ'g Co. v. City of Vancouver, 36 Wn. App. 25, 29-30, 671 P.2d 280 (1983). This interest exceeds the minimal interest the public has in most employee's performance because the executive is a public official. See Columbia, 35 Wn. App. at 29. Second, persons in executive positions should expect that as a public figure, their job performances will be subject to public scrutiny. Spokane, 99 Wn. App. at 457. This is not true for most public employees. Spokane, 99 Wn. App. at 457.

The holding in *Bellevue John Does* is grounded in the exemption for performance-related records. *See, e.g., Bellevue John Does*, 189 P.3d at 152-53. But the case addressed the interests of teachers, not elected executive officers. The public has a much greater interest in the activities of its executive officers and executive officers have a much lower expectation of privacy in how their performance is evaluated. *Spokane*, 99 Wn. App. at 457. Thus, *Bellevue John Does* is not controlling.

Second, the allegation at issue concerns Judge Morgan's professional performance, and does not involve sexual assault on minors. Thus, the accusations do not raise the same privacy concerns that were raised in *Bellevue John Does* case. *Compare Columbia*, 36 Wn. App. at 29-30 (ruling disclosure of complaints that "entirely concern the chief's professional performance" "might embarrass the chief but would not violate his right to privacy") with *Bellevue John Does*, 189 P.3d at 150 (noting that the "mere fact of the allegation of sexual misconduct toward a minor may hold the teacher up to hatred and ridicule in the community").

These two factual differences make for a different balancing of the public interest than occurred in *Bellevue John Does*. Where in *Bellevue John Does*, the public's interest was only "gossip and sensation," (*Bellevue John Does*, 189 P.3d at 150), the public has a much greater interest in the performance of executive officials. This is particularly true

for elected officers, whose only real "performance review" occurs when they are up for re-election. The voters have an interest in all information that will assist them in making their votes. And while the harm of disclosing a mere accusation of sexual assault can devastate a teacher's career, which would harm the public by harming teacher morale and by discouraging people from entering the teaching profession, disclosing an accusation of hostile work environment has not had such harmful effect. Thus, the public's interest in this case far exceeds the public's interest in *Bellevue John Does*, making that case inapplicable. 12

7.4 Judge Morgan Waived Any Attorney-Client Privilege When He Forwarded the City Attorney's Email

The trial court properly ruled that Judge Morgan waived the attorney-client privilege when he forwarded an email from the City Attorney to a third party, Federal Way City Councilmember Linda Kochmar. CP 135 ¶10. While it is not clear why Judge Morgan shared this email with Ms. Kochmar, Ms. Kochmar's interests in the matter were not identical to Judge Morgan's or the Municipal Court's interests. Moreover, it was not disclosed in a formal city council setting or shared with the entire council. Under these circumstances, Courts have held that

¹² This is not to say unsubstantiated accusations of sexual assault made against even an executive officer should be disclosed, or unsubstantiated accusations of harassment by non-executive officers should always be disclosed. Those lines should be drawn in subsequent cases.

any privilege was waived. See, e.g., Reed v. Baxter, 134 F.3d 351, 357-58 (6th Cir. 1998) (holding that privilege was waived for conversation between fire chief and city attorney when two city councilmembers were present, where councilmembers' interests differed from fire chief's, and presentation was to only two councilmembers, not the full council). Just because a city has an interest in a legal matter, this does not mean any individual legislator has an interest in reviewing attorney-client communications. Reed, 134 F.3d at 357-58.

There is no common legal interest in the Plenefisch investigation between Judge Morgan and councilmember Kochmar that would justify Judge Morgan sharing this attorney-client communication and expecting any privilege to apply. In a city such as Federal Way that has a council-city manager form of government, councilmembers have no authority over personnel matters, other than the performance of the city manager. RCW 35A.13.120 (prohibiting councilmembers from being involved in the administration of the city except through the city manager). Moreover, a review of the email shows there is no strategy being discussed and the portion relating to the Plenefisch investigations only makes up a small portion of the email. CP 215-16. Thus, the Court should reject Judge Morgan's "common interest" argument and find that Judge Morgan waived the privilege when he shared his email with a third party.

8. ARGUMENT ON CITY'S CROSS APPEAL

8.1 Standard of Review

A trial court's decision on whether to award attorney fees after dissolving a wrongfully issued injunction is reviewed for an abuse of discretion. *Cornell Pump Co. v. City of Bellingham*, 123 Wn. App. 226, 232, 98 P.3d 84 (2004)A trial court abuses its discretion if its exercise of discretion was "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Olver v. Fowler*, 161 Wn.2d 655, 663, 168 P.3d 348 (2007). A decision rests on untenable grounds if based on facts unsupported in the record or if the trial court applied the wrong legal standard. *T.S. v. Boy Scouts of Am.*, 157 Wn.2d 416, 423-24, 138 P.3d 1053 (2006).

Here, the trial court abused its discretion by applying a rule that would bar an award of attorney fees in all PRA cases. No such blanket prohibition exists. Moreover, in light of the facts here, where the person obtained a TRO by wrongfully informing the commissioner that he had provided notice, when in fact no notice had been provided, such a blanket rule would be unjust and an abuse of discretion.

8.2 The City Is Entitled to Attorney Fees for the City's Efforts to Vacate the TRO

8.2.1 Washington law allows for an award of attorney fees a party incurs in vacating a wrongly issued TRO.

"Attorney's fees are recoverable as a cost of dissolving a wrongfully issued temporary injunction or restraining order." *Seattle Firefighters Union v. Hollister*, 48 Wn. App. 129, 138, 737 P.2d 1302 (1987) (awarding attorney fees where TRO was "wrongfully" issued). "A temporary restraining order is 'wrongful' if it is dissolved at the conclusion of a full hearing. *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 143, 937 P.2d 154 (1997).

The Supreme Court has recognized that under this general rule, courts have discretion to award attorney fees in third-party Public Records Act suits when the Court determines that an injunction was wrongfully issued: "actual costs and attorney fees ... may be awarded where a party succeeds in getting a wrongfully issued injunction dissolved." *Spokane Police Guild v. Wash. State Liquor Control Board*, 112 Wn.2d 30, 35, 769 P.2d 283 (1989). Thus, in *Seattle Firefighters*, after the appellate court determined that an injunction blocking the release of a record was wrongfully issued because no exemption to the Public Records Act applied, the appellate court awarded the defendant attorney fees both at the trial court and on appeal. *Seattle Firefighters*, 48 Wn. App. at 138.

8.2.2 <u>Judge Morgan wrongly obtained a TRO, so the City</u> is entitled to attorney fees.

Here, Judge Morgan obtained the TRO by misrepresenting to the Commissioner that the City had notice of the hearing and had elected not to attend. RP (3/5) at 2. Once the City had notice and was able to argue against the injunction at the hearing on March 19, the trial court vacated the injunction, making it "wrongful." CP 101-02. In addition to ruling that no exemption applied, the trial court also noted that there was no basis in the Court file that would allow the Commissioner to issue the original injunction without notice to the City of Federal Way. RP (3/19 Decision) at 5:17-23.

Therefore, under *Seattle Firefighters* and *Spokane Police Guild*, the injunction was wrongfully issued and the trial court should have awarded the City its attorney fees.

8.2.3 The PRA does not prohibit an award of attorney fees when a third party wrongfully obtains a TRO.

The trial court held that under the Supreme Court's opinion in Confederated Tribes of the Chehalis Reservation v. Johnson, 135 Wn.2d

¹³ Although the Court did not vacate the portion of the order disqualifying the City Attorney, as that order makes clear, "The City has not opposed this order." Thus, no fees were incurred in relation to that portion of the order. As a result, any claim by Judge Morgan that he partially prevailed at the hearing is incorrect. The Court in *Cecil v. Dominy*, recognized this principle in awarding fees to the party wrongfully enjoined on the issue that was contested. *Cecil v. Dominy*, 69 Wn.2d 289, 290, 418 P.2d 233 (1966) ("Where the sole issue in a trial is whether a temporary injunction shall be made permanent, . . . a reasonable attorney's fee [is] a recoverable element of damages for procuring dissolution of the injunction").

734, 758-59, 958 P.2d 260 (1998) attorney fees were not warranted because a TRO was the only way Judge Morgan could obtain relief and if he waited until a hearing, it would have been fruitless because the record would have been disclosed. Sub 69. This ruling amounts to a blanket ruling that attorney fees could never be awarded in third-party injunction PRA cases.

This ruling is based on a misreading of the *Confederated Tribes* case and is directly contrary to the Supreme Court's statements in *Spokane Police Guild*. Moreover, it ignores the fact that Judge Morgan did not simply seek injunctive relief – he sought a TRO without complying with the notice requirements.

Confederated Tribes did not eliminate a court's discretion to award fees in a Public Records Act case. Instead, all the Supreme Court held was that the trial court did not abuse its discretion in denying fees, because the injunction was necessary to preserve the party's rights at trial. Confederated Tribes, 135 Wn.2d at 758-59. The holding is limited. The Court did not rule it would have been an abuse of discretion to award fees at all.

Two facts in the *Confederated Tribes* opinion emphasize the limited nature of this holding. First, the Court cites the *Seattle Firefighters* case as authority without overruling it or suggesting it was wrongly decided. *Confederated Tribes*, 135 Wn.2d at 758. Its reliance on that opinion eliminates any suggestion that the Court was enacting a

blanket rule against attorney fees. Second, the Court's final statement on the attorney fee issue is "[i]f fees were to be awarded based on this equitable rule, they would be limited to those necessary to dissolve the temporary restraining order, not those connected with the appeal." *Confederated Tribes*, 135 Wn.2d at 758-59. Again, had the Court meant to completely bar attorney fee awards in third-party Public Records Act suits, there would have been no reason for this statement. As a result, the Court re-affirmed the long-established standard that the Court has the equitable power to award attorney fees incurred by a party in having a wrongfully issued injunction dissolved.

Two subsequent opinions from this Court recognize at least one situation where attorney fees would be appropriate – when the person obtaining the injunction acted unreasonably. See *Cornell Pump Co. v. City of Bellingham*, 123 Wn. App. 226, 98 P.3d 84 (2004) (awarding fees despite *Confederated Tribes*) and *Quinn Constr. Co. v. King County Fire Prot. Dist.*, 111 Wn. App. 19, 44 P.3d 865 (2002) (denying fees based on *Confederated Tribes*). Here, Judge Morgan's decision to seek a TRO without providing notice, and then informing the Commissioner that notice had been provided, is the type of unreasonable action that should warrant an award of attorney fees.

In *Quinn*, this Court held that attorney fees were not warranted because the only way the plaintiff in that case could challenge a bid was to seek a TRO – once a contract was signed, it was too late to make a challenge. *Quinn*, 111 Wn. App. at 34-35. In *Cornell*, the Court held that *Quinn*, relying itself on *Confederated Tribes*, did not create an absolute bar to attorney fees. *Cornell*, 123 Wn. App. at 235. Instead, it held that even when an injunction is the only way to preserve the party's rights pending trial, fees are still appropriate if the party is unreasonable in seeking the injunction. *Cornell*, 123 Wn. App. at 236. In that case, it was unreasonable because the party's bid was non-conforming.

Here, it was unreasonable for Judge Morgan to seek a TRO without providing notice to the City of Federal Way. See CP 49 ¶4.9. This was then compounded when Judge Morgan informed the Commissioner that it had provided the City with notice and the City had elected not to attend. RP (3/5) at 2. The trial court, however, adopted a blanket rule and denied fees. In light of Judge Morgan's conduct, this conclusion was legally erroneous and amounts to an abuse of discretion. Accordingly, this Court should remand to the trial court on this issue so it can re-evaluate in light of controlling authority and to exercise discretion.

9. CONCLUSION

After reviewing the Stephson Report and considering Judge Morgan's efforts to keep that report from the public, the Court will recognize the import of the statutory purposes of the Public Records Act:

The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created.

RCW 42.56.030.

In light of Judge Morgan's conduct and behaviors detailed and substantiated in the Stephson Report, it is no surprise that Judge Morgan would insist that the City cannot investigate his conduct and the public should be kept in the dark about how he runs the City's court. But his potential embarrassment over the contents of the Stephson report is not a valid ground for keeping a record private. Again, the statute itself makes this clear:

Courts shall take into account the policy of this chapter that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others.

RCW 42.56.550(3).

The City has an independent interest is knowing what is occurring in its Municipal Court and in responding to claims of a hostile work

environment. The record of the City's investigation is a public record and not exempt from disclosure. The Court should affirm the trial court's ruling allowing the City to disclose the report and reverse the trial court's ruling denying the City recovery of its attorney fees.

RESPECTFULLY SUBMITTED this 27th day of August, 2008.

FOSTER PEPPER PLLC

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691 A.2d 321

148 N.J. 524, 691 A.2d 321, 73 Fair Empl.Prac.Cas. (BNA) 1149, 70 Empl. Prac. Dec. P 44,645

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Payton v. New Jersey Turnpike Authority N.J.,1997.

Supreme Court of New Jersey.

Joanne PAYTON, Plaintiff-Respondent,

NEW JERSEY TURNPIKE AUTHORITY, Defendant-Appellant,

andMichael Stankowitz and Robert C. Geberth, Individually and as employees of the New Jersey
Turnpike Authority, Defendants.
Argued Jan. 7, 1997.
Decided March 26, 1997.

Female public employee brought action against her employer and two of her supervisors for sexual harassment under Law Against Discrimination (LAD). The Superior Court, Law Division, Essex County, granted employer's motion for protective order, and employee brought interlocutory appeal. The Superior Court, Appellate Division, D'Annunzio, J.A.D., 292 N.J.Super. 36, 678 A.2d 279 reversed and remanded, and employer moved for leave to appeal. The Supreme Court, Handler, J., held that: (1) materials relating to employer's internal investigation of alleged sexual harassment were generally discoverable; (2) conditional privilege applied to discovery of allegedly confidential material relating to internal investigation; (3) privilege of self-critical analysis would not be adopted to justify protective order; (4) attorney-client privilege did not provide blanket protection simply because employer's attorneys participated in investigation; (5) in camera review was required to determine applicability of attorney-client privilege and work-product doctrine; (6) Open Public Meetings Act provided employer no additional protection.

Affirmed; cause remanded.

West Headnotes

[1] Pretrial Procedure 307A 5 13

307A Pretrial Procedure

307AII Depositions and Discovery 307AII(A) Discovery in General

307Akl3 k. Construction of Discovery

Provisions. Most Cited Cases

Discovery rules are to be construed liberally in favor of broad pretrial discovery.

[2] Pretrial Procedure 307A 531

307A Pretrial Procedure

307AII Depositions and Discovery 307AII(A) Discovery in General

307Ak31 k. Relevancy and Materiality.

Most Cited Cases

In determining whether materials relating to defendant's internal investigation are discoverable, court evaluates, as initial matter, their relevance to issues raised in litigation. N.J.S.A. 2A:84A, App. A, Rules of Evid., N.J.R.E. 401.

[3] Civil Rights 78 € 1189

78 Civil Rights

78II Employment Practices

78k1181 Sexual Harassment; Work Environ-

ment

78k1189 k. Knowledge or Notice; Preventive or Remedial Measures. Most Cited Cases (Formerly 78k167)

Civil Rights 78 \$\infty\$ 1736

78 Civil Rights

78V State and Local Remedies

78k1734 Persons Protected, Persons Liable, and Parties

78k1736 k. Employment Practices. Most Cited Cases

(Formerly 78k167)

Employer's liability for its own negligence in failing to take effective remedial measures to end sexual harassment is form of direct liability in addition to vicarious liability.

[4] Civil Rights 78 🖘 1189

78 Civil Rights

78II Employment Practices

78k1181 Sexual Harassment; Work Environment

78k1189 k. Knowledge or Notice; Preventive or Remedial Measures. Most Cited Cases (Formerly 78k167)

Efficacy of employer's remedial program is highly relevant to both employee's sexual harassment claim against employer and employer's defense to liability.

[5] Civil Rights 78 5 1189

78 Civil Rights

78II Employment Practices

78k1181 Sexual Harassment; Work Environment

78k1189 k. Knowledge or Notice; Preventive or Remedial Measures. Most Cited Cases (Formerly 78k167)

Effective remedial measures by employer in response to employee's sexual harassment claim under law against discrimination include process by which employer arrives at sanctions that it imposes on alleged harasser; if effective measures are those reasonably calculated to end harassment, neither court nor jury can evaluate effectiveness without considering entire remedial process. N.J.S.A. 10:5-1 to 10:5-42.

[6] Civil Rights 78 🖘 1103

78 Civil Rights

78II Employment Practices

78k1102 Constitutional and Statutory Provisions

78k1103 k. In General. Most Cited Cases (Formerly 78k141)

State law against discrimination (LAD) draws significantly from federal antidiscrimination law. N.J.S.A. 10:5-1 to 10:5-42.

[7] Civil Rights 78 @== 1189

78 Civil Rights

78II Employment Practices

78k1181 Sexual Harassment; Work Environment

78k1189 k. Knowledge or Notice; Preventive or Remedial Measures. Most Cited Cases (Formerly 78k167)

Remedial scheme of employer in response to employee's sexual harassment complaint that reaches correct result through process that is unduly prolonged or that unnecessarily and unreasonably leaves employee exposed to continued hostility in workplace is ineffective remedial scheme, which indirectly punishes employees with temerity to complain about sexual harassment and cannot be "effective" remediation, as required by law against discrimination. N.J.S.A. 10:5-1 to 10:5-42.

[8] Pretrial Procedure 307A 5377

307A Pretrial Procedure

307AII Depositions and Discovery

307AII(E) Production of Documents and Things and Entry on Land

307AII(E)3 Particular Documents or

Things

307Ak377 k. Corporate Records. Most

Cited Cases

Materials relating to employer's internal investigation of alleged sexual harassment were relevant to employee's claim under law against discrimination (LAD), so that they were generally discoverable. N.J.S.A. 10:5-1 to 10:5-42.

[9] Pretrial Procedure 307A 53

307A Pretrial Procedure

307AII Depositions and Discovery

307AII(A) Discovery in General

307Ak33 k. Privileged Matters in Gener-

al. Most Cited Cases

Although relevance creates presumption of discoverability, that presumption can be overcome by demonstrating applicability of evidentiary privilege. R. 4:10-2(a).

[10] Witnesses 410 @== 184(1)

410 Witnesses

410II Competency

410II(D) Confidential Relations and Privileged Communications

410k184 Nature and Grounds of Privilege in General

410k184(1) k. In General. Most Cited

Cases

Privilege reflects societal judgment that need for confidentiality outweighs need for disclosure.

[11] Witnesses 410 \$\infty\$ 184(1)

410 Witnesses

410II Competency

410II(D) Confidential Relations and Privileged Communications

410k184 Nature and Grounds of Privilege in General

410k184(1) k. In General. Most Cited

Cases

Applicability of evidentiary privilege is determined through case-by-case balancing, rather than categorical approach to concerns about confidentiality; desire to attain truth through adversarial process disfavors categorical approach.

[12] Pretrial Procedure 307A \$\infty\$ 36.1

307A Pretrial Procedure

307AII Depositions and Discovery 307AII(A) Discovery in General

307Ak36 Particular Subjects of Disclos-

ure

307Ak36.1 k. In General. Most Cited

Cases

Conditional, not blanket, privilege applied to discovery of allegedly confidential material relating to internal sexual harassment investigations by employer in response to employee's harassment complaint; trial court would supervise discovery of relevant internal investigatory materials and require procedures that protect confidentiality of those involved in investigation if loss of confidentiality

would otherwise undermine efficacy of investigations.

[13] Civil Rights 78 \$\infty\$ 1189

78 Civil Rights

78II Employment Practices

78k1181 Sexual Harassment; Work Environment

78k1189 k. Knowledge or Notice; Preventive or Remedial Measures. Most Cited Cases (Formerly 78k167)

Confidentiality is important component of any policy designed to maximize reporting of alleged sexual harassment and to ensure accuracy of ensuing investigations into those allegations.

[14] Civil Rights 78 \$\infty\$ 1189

78 Civil Rights

78II Employment Practices

78k1181 Sexual Harassment; Work Environment

78k1189 k. Knowledge or Notice; Preventive or Remedial Measures. Most Cited Cases (Formerly 78k167)

Civil Rights 78 € 1263

78 Civil Rights

78II Employment Practices

78k1263 k. Waiver; Effect of Labor Contracts. Most Cited Cases

(Formerly 78k167)

Alleged victim of sexual harassment waives her confidentiality interest by bringing suit against her employer under law against discrimination (LAD). N.J.S.A. 10:5-1 to 10:5-42.

[15] Pretrial Procedure 307A \$\infty\$36.1

307A Pretrial Procedure

307AII Depositions and Discovery 307AII(A) Discovery in General 307Ak36 Particular Subjects of Disclos-

ure

307Ak36.1 k. In General. Most Cited

Cases

Privilege of self-critical analysis would not be adopted to justify protective order against disclosure of materials relating to employer's internal investigation of alleged sexual harassment; case-by-case balancing more appropriately accommodated selfcritical analysis than per se privilege.

[16] Pretrial Procedure 307A 533

307A Pretrial Procedure

307AII Depositions and Discovery 307AII(A) Discovery in General

307Ak33 k. Privileged Matters in Gener-

al. Most Cited Cases

Privilege of self-critical analysis exempts from disclosure deliberative and evaluative components of organization's confidential materials.

[17] Pretrial Procedure 307A 🖘 33

307A Pretrial Procedure

307AII Depositions and Discovery 307AII(A) Discovery in General

307Ak33 k. Privileged Matters in Gener-

al. Most Cited Cases

Although significant weight should be accorded to self-critical analysis and confidentiality concerns about information at times may outweigh competing interests in disclosure, certain interests in disclosure are strong enough, in their reflection of important public policies, to outweigh confidentiality concerns under most, if not all, circumstances.

[18] Pretrial Procedure 307A \$\infty\$ 36.1

307A Pretrial Procedure

307AII Depositions and Discovery 307AII(A) Discovery in General 307Ak36 Particular Subjects of Disclos-

ure

307Ak36.1 k. In General. Most Cited

Cases

Balancing employer's interest in nondisclosure of its self-criticism during its own internal investigation of sexual harassment charges with complaining employee's request for disclosure of those materials is normally best struck in favor of disclosure, even though both interests reflect public policy of eradicating discrimination.

[19] Pretrial Procedure 307A \$\infty\$=411

307A Pretrial Procedure

307AII Depositions and Discovery

307AII(E) Production of Documents and Things and Entry on Land

307AII(E)4 Proceedings

307Ak411 k. Determination, Most

Cited Cases

Attorney-client privilege did not provide blanket protection for employer's entire investigatory process in response to employee's sexual harassment complaint simply because employer's attorneys participated in investigation; documents must be reviewed in camera, in light of need for effective remedial steps against harassing employee, principles applicable to attorney-client privilege, including exact role that attorney played regarding each particular document for which privilege is asserted, and need to shield identities of witnesses.

[20] Witnesses 410 \$\infty\$200

410 Witnesses

410II Competency

 $410\mathrm{II}(\mathrm{D})$ Confidential Relations and Privileged Communications

410k197 Communications to or Advice by Attorney or Counsel

410k200 k. Professional Character of Employment or Transaction. Most Cited Cases Attorney who is not performing legal services or providing legal advice in some form does not qualify as "lawyer" for purposes of attorney-client privilege. N.J.S.A. 2A:84A, App. A, Rules of Evid., N.J.R.E. 504(3).

[21] Witnesses 410 \$\infty\$ 200

410 Witnesses
410II Competency

410II(D) Confidential Relations and Privileged Communications

410k197 Communications to or Advice by Attorney or Counsel

410k200 k. Professional Character of Employment or Transaction. Most Cited Cases Attorney-client privilege does not apply when attorney conducts investigation for purpose other than preparing for litigation or providing legal advice, even where litigation may eventually arise from subject of attorney's activities. N.J.S.A. 2A:84A, App. A, Rules of Evid., N.J.R.E. 504(3).

[22] Witnesses 410 \$\infty\$ 219(3)

410 Witnesses

410II Competency

 $410\mathrm{II}(\mathrm{D})$ Confidential Relations and Privileged Communications

410k219 Waiver of Privilege

410k219(3) k. Communications to or Advice by Attorney or Counsel. Most Cited Cases Employer, by relying on affirmative defense of having conducted effective investigation into employee's allegations of sexual harassment by her supervisors, waived attorney-client privilege, assuming privilege applied to certain documents relating to employer's internal investigation. N.J.S.A. 2A:84A, App. A, Rules of Evid., N.J.R.E. 504(3).

[23] Witnesses 410 @== 198(1)

410 Witnesses

410II Competency

410II(D) Confidential Relations and Privileged Communications

410k197 Communications to or Advice by Attorney or Counsel

410k198 In General

410k198(1) k. In General. Most

Cited Cases

Party may not abuse privilege, including attorney-client privilege, by asserting claim or defense and then refusing to provide information underlying that claim or defense based on privilege.

[24] Pretrial Procedure 307A \$\infty\$411

307A Pretrial Procedure

307AII Depositions and Discovery

307AII(E) Production of Documents and Things and Entry on Land

307AII(E)4 Proceedings

307Ak411 k. Determination. Most

Cited Cases

In camera review was required to determine whether work-product doctrine protects materials from employer's internal investigation of employee's sexual harassment complaint, even though doctrine most likely did not protect those materials, since investigation allegedly began months before employee commenced litigation, employee demonstrated need for documents, and employer may have waived protection of doctrine by asserting investigation as affirmative defense. R. 4:10-2(c).

[25] Pretrial Procedure 307A 538

307A Pretrial Procedure

307AII Depositions and Discovery
307AII(E) Production of Documents and Things and Entry on Land

307AII(E)2 Subject Matter in General 307Ak356 Privileged Matters

307Ak358 k. Preparation for or Anticipation of Litigation; Attorney's Work Product. Most Cited Cases

Work-product doctrine applies to prevent disclosure if materials sought were prepared in anticipation of litigation and not in ordinary course of business, and there is not "substantial need" for materials. R. 4:10-2(c).

[26] Administrative Law and Procedure 15A

15A Administrative Law and Procedure

15AII Administrative Agencies, Officers and Agents

15Ak124 k. Meetings in General. Most Cited Cases

Open Public Meetings Act guarantees public notice

of and access to meetings, including executive sessions, of public bodies. N.J.S.A. 10:4-6 to 10:4-21.

[27] Administrative Law and Procedure 15A

15A Administrative Law and Procedure

15AII Administrative Agencies, Officers and

15Ak124 k. Meetings in General. Most Cited Cases

Although Open Meetings Act creates strong presumption of access to meetings of public bodies, it provides circumstances under which presumption is rebutted. N.J.S.A. 10:4-12, subds. a, b.

[28] Administrative Law and Procedure 15A €~~124

15A Administrative Law and Procedure

15AII Administrative Agencies, Officers and Agents

15Ak124 k. Meetings in General. Most Cited Cases

Circumstances under which rebuttal of presumption of access is recognized under Open Public Meetings Act are strictly construed, given stated legislative intent that meetings of public bodies are to be open to public unless public interest would be clearly endangered or personal privacy or guaranteed rights of individuals would be clearly in danger of unwarranted invasion. N.J.S.A. 10:4-7.

[29] Administrative Law and Procedure 15A € 124

15A Administrative Law and Procedure

15AII Administrative Agencies, Officers and Agents

15Ak124 k. Meetings in General. Most Cited Cases

Public body that meets in private generally must make minutes of its meeting promptly available to public. N.J.S.A.10:4-14.

[30] Administrative Law and Procedure 15A € 124

15A Administrative Law and Procedure

15AII Administrative Agencies, Officers and Agents

15Ak124 k. Meetings in General. Most Cited Cases

To accommodate any privacy interest that may be implicated by disclosure of minutes of legitimate closed session, extent of disclosure may be modified appropriately, provided public interest is not subverted, N.J.S.A. 10:4-14.

[31] Administrative Law and Procedure 15A € 124

15A Administrative Law and Procedure

15AII Administrative Agencies, Officers and Agents

15Ak124 k. Meetings in General. Most Cited Cases

Only unusual case will justify total suppression of minutes of closed session of public body; such case would require great harm to public interest underlying exception from even minimal disclosure as well as negligible interest in disclosure. N.J.S.A. 10:4-6 to 10:4-21.

[32] Administrative Law and Procedure 15A € 124

15A Administrative Law and Procedure

15AII Administrative Agencies, Officers and Agents

15Ak124 k. Meetings in General. Most Cited Cases

Civil Rights 78 \$\infty\$ 1709

78 Civil Rights

78V State and Local Remedies

78k1705 State or Local Administrative Agencies and Proceedings

78k1709 k. Charges and Investigations. Most Cited Cases

(Formerly 78k442.1)

Neither personnel decision exception nor privacy

concerns applied to allow closure under Open Pub-

lic Meetings Act of public agency's meetings to investigate sexual harassment complaints of employee, where employee had already filed suit, punishment of harassers had already been publicly announced, and agency was responsible for operations of highways, not social service or health care programs. N.J.S.A. 10:4-12, subd. b(3).

[33] Administrative Law and Procedure 15A

15A Administrative Law and Procedure

15AII Administrative Agencies, Officers and Agents

15Ak124 k. Meetings in General. Most Cited Cases

Open Public Meetings Act provided no additional protection for materials from public agency's internal investigation of employee's sexual harassment charges than attorney-client privilege or work-product doctrine. N.J.S.A. 10:4-12, subd. b(7); R. 4:10-2(c); N.J.S.A. 2A:84A, App. A, Rules of Evid., N.J.R.E. 504(3).

[34] Appeal and Error 30 \$\infty\$961

30 Appeal and Error 30XVI Review

30XVI(H) Discretion of Lower Court

30k961 k. Depositions, Affidavits, or Discovery. Most Cited Cases

While reviewing court normally defers to trial court's disposition of discovery matters, including formulation of protective orders, unless court has abused its discretion, deference is inappropriate if court's determination in drafting its order is based on mistaken understanding of applicable law.

**324*531 Michael K. Furey, Morristown, argued the cause for appellant (Riker, Danzig, Scherer, Hyland & Perretti, attorneys; Mr. Furey and James P. Anelli, on the briefs).

Patricia M. Talbert, Roseland, argued the cause for respondent (Carella, Byrne, Bain, Gilfillan, Cecchi, Stewart & Olstein, attorneys).

Nancy Erika Smith, West Orange, submitted a brief

on behalf of amici curiae National Employment Lawyers Association, New Jersey Employment Lawyers Association and National Organization for Women of New Jersey (Smith Mullin, attorneys; Ms. Smith, Christopher P. Lenzo, West Orange and Fredric J. Gross, Mount Ephraim, on the brief).

Richard C. Mariani, Warren, submitted a brief on behalf of amicus curiae The New Jersey Chambers of Commerce (Apruzzese, McDermott, Mastro & Murphy, attorneys; Mr. Mariani and Kimberly E. Robertson, on the brief).

The opinion of the Court was delivered by *532 HANDLER, J.

In this case, an employee is suing her employer and two of her supervisors for sexual harassment under the Law Against Discrimination. She contends that her supervisors harassed her and that her employer failed to respond adequately to her complaints. Although the employer subsequently disciplined the supervisors after determining that the employee's claims were meritorious, the employee asserts that the employer's allegedly inadequate response to her complaints contributed to the harm that she suffered and consequently entitles her to damages.

The general question that we must consider is the nature and extent of the pretrial discovery that an employee claiming to have been sexually harassed is entitled to obtain for the purpose of establishing the employer's liability based on its alleged failure to respond to her complaints of sexual harassment. The more specific issues that must be addressed in this case relate to whether various documents and records pertaining to the employer's handling and disposition of the employee's complaints of sexual harassment, including its internal investigation, may be made available through discovery and the extent to which concerns based on confidentiality and privilege may preclude or limit the discovery of such materials.

I

Plaintiff Joanne Payton began working as a main-

tenance records clerk for defendant New Jersey Turnpike Authority in November 1990. Shortly after she started, two of her supervisors, Robert Geberth and Michael Stankowitz (the two highest ranking administrators in her unit), allegedly began to sexually harass her. According to plaintiff's complaint,**325 they harassed her in the following manners:

- (a) Defendant Geberth commented about Plaintiff's clothing[,] grabbing the bottom of her skirt and pulling it down, stated her clothes look like she is "wearing pajamas," put his hand around the Plaintiff, on her shoulder or on her knee and called Plaintiff into his office directing that she turn around so that he could look at her;
- *533 b) Defendant Stankowitz told Plaintiff on several occasions that he was "horny" and wanted "to get laid," referred to Plaintiff's breasts and said to her "just one time," tried to look down Plaintiff's blouse and, during lunch at a restaurant, took the Plaintiff's hand and put it between his legs;
- (c) During the office holiday luncheon on or about December 1993, Defendants Geberth and Stankowitz gave Plaintiff a "baby doll" nightgown. Defendant Geberth insisted that she open the gift in front of her office co-workers who were attending the luncheon; and
- (d) On or about July, 1993, Defendant Geberth slapped a female co-worker on the buttocks in the presence of several co-workers, including the Plaintiff.

For several years, plaintiff tolerated the harassment, but in September 1994, she filed an internal complaint with defendant.

During the approximately seven months following plaintiff's complaint, the alleged harassment continued, and defendant took no remedial action against the supervisors. On March 10, 1995, believing that defendant would not resolve the situation, plaintiff

brought suit in the Superior Court, Law Division against defendant and the supervisors, alleging with regard to defendant that it was vicariously liable under the Law Against Discrimination ("LAD"), *N.J.S.A.* 10:5-1 to -42, for the supervisors' conduct.

On April 26, 1995, defendant announced that it had disciplined the two supervisors, having suspended them without pay, demoted them, and reduced their salaries. Five days later, in answer to plaintiff's complaint, defendant raised these actions as an affirmative defense to vicarious liability, claiming that, by its response to her complaint of sexual harassment, it had neither participated in nor acquiesced in the harassment. Defendant later represented, through a privileged document log, that its Equal Employment Opportunity Officer ("EEO Officer") had made initial findings about the complaint on December 8, 1994 and (together with inhouse counsel) had issued a final investigative report on March 14, 1995, four days after plaintiff had filed suit. It also asserted that, on April 13, 1995, its Sexual Harassment Advisory Committee had completed a confidential review of the EEO Officer's report, including remedial recommendations, and that, on April 25, 1995, defendant's commissioners had convened an executive session *534 regarding the matter, during which they presumably had discussed the report and determined the appropriate sanctions.

In order to gauge the timeliness and thoroughness of defendant's actions (and hence the validity of defendant's affirmative defense that it had effectively remedied the harassment), plaintiff sought discovery of materials relating to the investigation and executive session. Specifically, she demanded "[a]ll documents relating to any investigation that was conducted by or for the defendant having to do with the plaintiff and her employment with the defendant [,] ... [a]ll documents relating to any investigation that was conducted by or for the defendant having to do with the plaintiff and her administrative complaint alleging sexual harassment[, and] ... [a]ny minutes, transcriptions, reports, supporting docu-

ments, agendas, [and] recordings related to [the Commissioners' April 25, 1995] meeting."

Defendant moved for a protective order exempting all of the requested documents from discovery. It also asked the court to seal the record. Plaintiff opposed the motion and, in the alternative, moved to strike the affirmative defense if defendant were not required to produce the documents.

The Law Division, without examining any of the documents in camera, granted the protective order in its entirety, thus removing from the discovery process all documents relating to the investigation. In support of its broad order, the court cited the public **326 policy of confidentiality embodied in the LAD. It also relied, to a lesser degree, on the attorney-client privilege and the so-called privilege of self-critical analysis.

Plaintiff then sought interlocutory relief in the Appellate Division, which granted leave to appeal and vacated the protective order. 292 N.J.Super. 36, 678 A.2d 279 (1996). Relying on our holding in Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 626 A.2d 445 (1993), the court concluded that plaintiff was at least entitled to discover information relating to "the extent of the Authority's investigation, the timing of the Authority's investigation relative to the date of plaintiff's complaint to the department, the information *535 gleaned by the Authority from its investigation, the Authority's evaluation of the information, and the action taken by the Authority." 292 N.J. Super. at 46, 678 A.2d 279. The Appellate Division instructed the trial court to inspect the documents at issue in camera and to make appropriate redactions in order to accommodate concerns about confidentiality and privilege. Id. at 53-54, 678 A.2d 279.

We granted defendant's motion for leave to appeal, 146 N.J. 495, 683 A.2d 198 (1996), and we now affirm.

[1] New Jersey's discovery rules are to be construed liberally in favor of broad pretrial discovery. Jenkins v. Rainner, 69 N.J. 50, 56, 350 A.2d 473 (1976) ("Our court system has long been committed to the view that essential justice is better achieved when there has been full disclosure so that the parties are conversant with all the available facts."); Catalpa Investment Group, Inc. v. Zoning Bd. of Adjustment, 254 N.J.Super. 270, 273, 603 A.2d 178 (Law Div.1991); Martin v. Educ. Testing Serv., Inc., 179 N.J.Super. 317, 327, 431 A.2d 868 (Ch.Div.1981). Under the rules, "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action..." R. 4:10-2(a). "Relevant evidence," although not defined in the discovery rules, is defined elsewhere as "evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the action." N.J.R.E. 401.

[2] In determining whether materials relating to defendant's internal investigation are discoverable, therefore, we must evaluate, as an initial matter, their relevance to the issues raised in this litigation. We look to Lehmann, supra, 132 N.J. 587, 626 A.2d 445, for guidance in this regard. In Lehmann, the plaintiff brought suit under the LAD, alleging hostile work environment arising from sexual harassment at the hands of her supervisor. Id. at 595-99, 626 A.2d 445. She did not simply sue the actual harassers, however, instead naming her employer and alleging *536 that it was vicariously liable; among her allegations was the employer's supposedly deficient investigation of her internal complaints. Id. at 599, 626 A.2d 445.

We held in *Lehmann* that the LAD's prohibition of sex discrimination created causes of action for sexual harassment and hostile work environment resulting from that harassment. *Id.* at 600-15, 626 A.2d 445. We then reached the difficult issue of employer liability under those circumstances and concluded that employers could be vicariously liable in damages under an agency theory for sexual

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harassment committed by employees, *id.* at 619-20, 626 A.2d 445, and that such liability would be governed by a variable standard depending on the state of mind of the employer. *Id.* at 619-26, 626 A.2d 445. Employers that were negligent in failing to take effective steps to end sexual harassment would be liable for compensatory damages, *id.* at 621-23, 626 A.2d 445, while those that actually participated in or were willfully indifferent to the wrongful conduct would be liable for punitive damages. *Id.* at 624-25, 626 A.2d 445.

[3] Of particular importance in *Lehmann*, we noted that an employer's liability for its own negligence in failing to take effective remedial measures was a form of direct liability in addition to vicarious liability. *Id.* at 623, 626 A.2d 445. We stated that

[w]hen an employer knows or should know of the harassment and fails to take effective measures to stop it, the employer has joined with the harasser in making the **327 working environment hostile. The employer, by failing to take action, sends the harassed employee the message that the harassment is acceptable and that the management supports the harasser.... "Effective" remedial measures are those reasonably calculated to end the harassment. The reasonableness of an employer's remedy will depend on its ability to stop harassment by the person who engaged in harassment.

[Ibid. (quotations and citations omitted).]

Thus, we determined that an employer that failed to take *effective* remedial measures against a harassing employee was, in essence, liable for its own conduct.

[4] While the effectiveness of an employer's remedial steps relates to an employee's claim of liability, it is also relevant to an *537 employer's affirmative defense that its actions absolve it from all liability. See infra at 540-41, 691 A.2d at 328-29. Thus, the efficacy of an employer's remedial program is highly relevant to both an employee's claim

against the employer and the employer's defense to liability.

Given the dual significance of the effectiveness of an employer's remedial actions, the critical interpretive question that confronts us in this case is the understanding of "effective" as the standard by which to evaluate the adequacy of an employer's response to a complaint of sexual harassment. If, as defendant argues, the effectiveness of a remedial scheme is measured solely by its final outcome, namely, the ultimate sanction imposed, then documents relating to the internal investigatory process leading up to the sanction are irrelevant to the harassment and hostile-work-environment claims against the employer and hence not discoverable. However, if effectiveness is gauged by the process of the investigation-including timeliness, thoroughness, attitude toward the allegedly harassed emplovee, and the like-as well as by the result of the investigation, then the documents are clearly relevant and discoverable.

[5] We are persuaded that the "effective" remedial measures emphasized in *Lehmann* include the process by which the employer arrives at the sanctions that it imposes on the alleged harasser. If effective measures are those "reasonably calculated to end the harassment," *Lehmann, supra,* 132 *N.J.* at 623, 626 *A.*2d 445, then neither a court nor a jury can evaluate effectiveness without considering the entire remedial process. As the Appellate Division noted:

[The] timeliness of an employer's response is an important element in determining the effectiveness of an anti-harassment program.... A slow response may be perceived as a reluctant response and call into question the *bona fides* of an employer's anti-harassment program. Similarly, an investigation, though timely instituted, may be pursued half-heartedly and unduly prolonged. On the other hand, a timely, vigorously pursued inquiry that corroborates the victim's accusations will compromise a well-designed anti-harassment program, if the employer drags its feet in acting

on the corroborative evidence.

[292 *N.J.Super*. at 47, 678 *A*.2d 279 (citation omitted).]

[6] *538 Numerous federal courts have adopted this position as well. See, e.g., Guess v. Bethlehem Steel Corp., 913 F.2d 463, 465 (7th Cir.1990); Harding v. Dana Transport, 914 F.Supp. 1084, 1094 (D.N.J.1996); Van Horn v. Elbeco, Inc., No. CIV. A. 94-2720, 1996 WL 385630, at *9 (E.D.Pa. July 10, 1996); Stewart v. Weis Markets, Inc., 890 F.Supp. 382, 390 (M.D.Pa.1995); Giordano v. William Paterson College, 804 F.Supp. 637, 643-44 (D.N.J.1992); Foster v. Township of Hillside, 780 F.Supp. 1026, 1039 (D.N.J.), aff'd,977 F.2d 567 (3d Cir.1992); Zabkowicz v. West Bend Co., 589 F.Supp. 780 (E.D.Wis.1984). Federal jurisprudence in this area is particularly relevant because the LAD draws significantly from federal antidiscrimination law. See Lehmann, supra, 132 N.J. at 617-19, 622-23, 626 A.2d 445.

In this case, full discovery may enable plaintiff to support and to advance her argument that defendant's delay in investigating her complaint and its delay in preparing a report until four days after she had filed this lawsuit reflected an unwillingness promptly to investigate and to remediate her allegations of sexual harassment. The claim is **328 based on an employer's obligation to create an effective investigatory and remedial process that does not discourage employees from exercising their statutory rights. See Lehmann, supra, 132 N.J. at 623, 626 A.2d 445; cf. Romano v. Brown & Williamson Tobacco Corp., 284 N.J.Super. 543, 665 A.2d 1139 (App.Div.1995) (in context of claim of retaliation against employee, inquiring into employer's internal reaction to employee's complaint of employer's illegal conduct).

[7][8] In short, a remedial scheme that reaches the correct result through a process that is unduly prolonged or that unnecessarily and unreasonably leaves the employee exposed to continued hostility in the workplace is an ineffective remedial scheme.

Such a process, in reality, indirectly punishes employees with the temerity to complain about sexual harassment and cannot constitute "effective" remediation. Indeed, such a scheme can be viewed only as an attempt by the employer to discourage employees from coming forward and utilizing the employer's remedial process in *539 the first place. Because of the importance of the remedial process in evaluating an employer's good faith in counteracting and attacking sexual harassment and in eliminating hostile work environment, we conclude that materials relating to an employer's internal investigation of alleged sexual harassment are relevant to a claim under the LAD and hence generally discoverable.

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[9][10][11] Although relevance creates a presumption of discoverability, that presumption can be overcome by demonstrating the applicability of an evidentiary privilege. R. 4:10-2(a). A privilege reflects a societal judgment that the need for confidentiality outweighs the need for disclosure. Hague v. Williams, 37 N.J. 328, 335, 181 A.2d 345 (1962); Wylie v. Mills, 195 N.J.Super. 332, 337, 478 A.2d 1273 (Law Div.1984). Despite the existence of privileges, however, our desire to attain truth through the adversarial process has led to a disfavoring of such a categorical approach to concerns about confidentiality, see United States v. Nixon, 418 U.S. 683, 710, 94 S.Ct. 3090, 3108, 41 L. Ed.2d 1039, 1065 (1974); Dixon v. Rutgers Univ., 110 N.J. 432, 446-47, 541 A.2d 1046 (1988); State v. Briley, 53 N.J. 498, 505-06, 251 A.2d 442 (1969); Hague, supra, 37 N.J. at 335, 181 A.2d 345; State v. Szemple, 263 N.J.Super. 98, 101-02, 622 A.2d 248 (App.Div.1993), aff'd,135 N.J. 406, 640 A.2d 817 (1994), in favor of case-by-case balancing. See Loigman v. Kimmelman, 102 N.J. 98, 103-04, 505 A.2d 958 (1986).

The disfavored status of privileges is the backdrop against which we analyze each of the grounds that defendant asserts to justify exclusion of its relevant investigatory materials from the discovery process. We note that our analysis of the various claims of privilege contains two common themes, namely, the strong public interest, embodied in the LAD, of eliminating discrimination and harassment and the balancing of that interest against various interests in confidentiality.

*540 A.

[12] Defendant contends that our decision in *Lehmann*, several decisions of the United States Supreme Court, and former-Governor Florio's issuance of Executive Order No. 88 combine to create a "public policy of confidentiality." The trial court relied heavily on this rationale in granting the protective order:

The Court would have to put on blinders to fail to recognize the fact that those who come forward in terms of this type of investigation do so with an understanding that any communication would be privileged.... I am satisfied that the paramount interest in terms of the law against discrimination relates to the public policy in promoting the purpose of the act [i.e., confidentiality and eliminating underreporting]. And to undermine that with an opening of the investigative process involved ... would be inappropriate and contrary to the purpose of the intent.... I am satisfied ... that information that is given under such cover should be maintained under such cover unless there are compelling reasons to dictate otherwise.

Although defendant does not use the word "privilege" in this context, it effectively urges **329 the creation of a privilege that precludes discovery of "confidential" materials relating to internal sexual-harassment investigations.

Both this Court, in Lehmann, supra, 132 N.J. at 622, 626 A.2d 445, and the United States Supreme Court, in Meritor Savings Bank v. Vinson, 477 U.S. 57, 72-73, 106 S.Ct. 2399, 2408, 91 L. Ed.2d 49, 63 (1986), have allowed employers to avoid liability

for sexual harassment by implementing effective procedures to combat this evil internally, thus encouraging victims to come forward and to report prohibited conduct. Moreover, then-Governor Florio, by executive order, mandated a review of anti-sexual-harassment procedures throughout the state government in order to make them "more effective and sensitive to the needs of victims of sexual harassment." Exec. Order No. 88, 25 N.J.R. 1799(b) (1993). The Department of Personnel, in response to the executive order, recommended that investigators of sexual harassment be cognizant of confidentiality in order to encourage victims to report allegations and to elicit candid statements from all involved, Review Committee on Sexual Harassment, New Jersey Department of Personnel, People Working Together: A Report on Sexual *541 Harassment (1993). We recognized the importance of confidentiality in this context in In re Seaman, 133 N.J. 67, 90-91, 627 A.2d 106 (1993).

[13] We reaffirm our belief that confidentiality is an important component of any policy designed to maximize reporting of alleged sexual harassment and to ensure the accuracy of ensuing investigations into such allegations. However, whether the importance of confidentiality leads to the creation of a privilege to refuse to produce documents relating to internal investigations implicates other important counterbalancing considerations. In Dixon, supra, 110 N.J. at 446-59, 541 A.2d 1046, we were confronted with a similar request to convert confidentiality concerns into a qualified privilege, in that case, one that would have precluded discovery of materials related to peer evaluation for university tenure determinations. We declined to create a privilege in that context, ibid., and the reasoning that we employed there is apposite in the context of this case.

In refusing, in *Dixon*, to create a qualified privilege in the peer-review situation, we distinguished the cases in which we had created such privileges, emphasizing that in those cases, the Court had been required to "balance *private* interests in disclosure

against public interests in confidentiality," whereas in the case before it the Court had to "balance the public interest in maintaining a confidential peer review process that protects the university's academic freedom against our State's strong public policy favoring disclosure and eradication of discriminatory treatment in employment." Id. at 451, 541 A.2d 1046. We then determined that the powerful legislative policy embodied in the LAD of eliminating discrimination overrode the interest in maintaining an iron curtain around the peer-review process. Id. at 451-54, 541 A.2d 1046.

As in Dixon, and unlike the cases in which we have recognized new privileges, we are confronted with two competing public interests, as opposed to a private interest in disclosure that is outweighed by a strong public interest in confidentiality. Unlike *542 Dixon, however, the two asserted interests in this case-disclosure to ensure that employers maintain effective sexual-harassment procedures and nondisclosure to enable employers to maintain effective procedures that encourage reporting and candid statements by all involved-both claim to strive for the same goal, namely, an end to sexual harassment.

Because those advocating disclosure and those advocating nondisclosure pledge allegiance to the same goal-eradication of sexual harassment-while arguing for different methods of achieving that goal, we cannot simply fall back on the maxim that "[t]he eradication of the cancer of discrimination has long been one of our State's highest priorities," id. at 451,541 A.2d 1046 (internal quotations omitted) (quoting Fuchilla v. Layman, 109 N.J. 319, 334, 537 A.2d 652,cert. denied, 488 U.S. 826, 109 S.Ct. 75, 102 L.Ed.2d 51 (1988)), to resolve the conflict. Instead, we must determine which method of achieving the unanimously supported goal will best achieve that goal.

We conclude that the appropriate balance is not to create a blanket privilege **330 arising from legitimate general concerns for confidentiality, but rather to recognize a conditional privilege that ap-

plies selectively depending on the nature of the materials involved. In its application, the trial court may supervise discovery of the relevant internal investigatory materials and require procedures that protect the confidentiality of those involved in the investigation if a loss of confidentiality would otherwise undermine the efficacy of investigations. Such procedures, short of suppression, may include redaction, issuance of confidentiality or gag orders, and sealing of portions of the record. Only in truly extreme cases should the need for confidentiality require suppression of specific documents.

[14] We believe that those procedures are preferable to a privilege because confidentiality concerns in this context are less acute as a result of the limited number of participants who will benefit from a secretive process. Obviously, a plaintiff waives her confidentiality interest by bringing suit. Moreover, the employer *543 and any other defendants, namely, the actual harassers, already have been named in the suit, and other material witnesses already may be well-known. Consequently, the only persons who benefit from confidentiality in this type of case are witnesses who may not be known or whose cooperation otherwise may not be forthcoming, and their identities can be protected through redaction. Furthermore, there may be situations in which such witnesses no longer have a continuing need for confidentiality or may be deemed to have relinquished or waived their interest in confidentiality.

The Appellate Division addressed the concern about witness confidentiality, and we agree with its observation that "it may not be possible to protect [witnesses'] identities throughout the entire course of the litigation consistent with plaintiff's right to the opportunity to establish a cause of action...." 292 N.J.Super. at 48, 678 A.2d 279. Unfortunately, even the best efforts to maintain confidentiality may fail during the lifespan of a lawsuit. Yet, we must rely on the creativity of the trial court and the good faith of the parties to guard against unnecessary revelation and thus to protect the integrity of

the investigatory process. FN1

FN1. We note that codefendants Geberth and Stankowitz have filed counterclaims and cross-claims against plaintiff (for defamation and other assorted theories) and defendant (for indemnification and contribution). Given the potential claims of the codefendants, they may at some point request access to the investigatory files. Indeed, Geberth's counsel, in supporting defendant's request for the protective order, specifically reserved the right to request the materials in the future for Geberth's claims.

In rejecting defendant's claim of privilege based on confidentiality, we express no opinion about the merits of an identical claim by defendant in the future should one or both of the codefendants request the materials. In such an eventuality, the trial court would have to balance the codefendants' private interest in being compensated for defamation or some other claim and the public interest in confidentiality of harassment investigations in order to encourage candid statements and to prevent retaliation. See Korostynski v. State Div. of Gaming Enforcement, 266 N.J.Super. 549, 558-59, 630 A.2d 342 (App.Div.1993) (noting that private interest in disclosure may be outweighed by public interest in confidentiality even if public interest in disclosure, such as enforcement of antidiscrimination laws, may outweigh the same public interest in confidentiality).

*544 We therefore conclude that, regarding confidentiality, the balance weighs in favor of disclosure with appropriate procedures to ensure justified confidentiality in light of plaintiff's paramount interest in obtaining relevant materials.

B.

[15] Defendant also relies on the so-called privilege of self-critical analysis in justifying the protective order. The trial court relied in part on that privilege in granting the order, while the Appellate Division rejected its applicability because of the importance of the materials to plaintiff's case. 292 N.J.Super. at 48-49, 678 A.2d 279. Both courts, as have a number of lower courts, assumed the existence of this broad privilege in New Jersey despite the fact that this Court never actually has adopted it, only having referred to it without expressing an opinion as to its validity. Loigman, supra, 102 N.J. at 107, 505 A.2d 958; **331McClain v. College Hosp., 99 N.J. 346, 359, 492 A.2d 991 (1985).

[16] The privilege of self-critical analysis exempts from disclosure deliberative and evaluative components of an organization's confidential materials. Tharp v. Sivyer Steel Corp., 149 F.R.D. 177, 179-80 (S.D.Iowa 1993). According to one court, "[t]he primary justification for this privilege is the encouragement of candor and frankness toward the ends of discovering the reasons for past problems and preventing future problems." Korostynski, supra, 266 N.J.Super. at 557, 630 A.2d 342. Although some courts have rejected the privilege, e.g., Etienne v. Mitre Corp., 146 F.R.D. 145, 148-49 (E.D.Va.1993); Siskonen v. Stanadyne, Inc., 124 F.R.D. 610, 611-12 (W.D.Mich.1989); Hardy v. New York News, Inc., 114 F.R.D. 633, 641-43 (S.D.N.Y.1987), others have adopted it. E.g., In re Crazy Eddie Sec. Litig., 792 F.Supp. 197, 205-06 (E.D.N.Y.1992); Roberts v. Carrier Corp., 107 F.R.D. 678, 684-85 (N.D.Ind.1985); Bredice v. Doctors Hosp., Inc., 50 F.R.D. 249, 251 (D.D.C.1970), aff'd,479 F.2d 920 (D.C.Cir.1973).

Several lower courts in this State have adopted the privilege and granted seemingly absolute protection to evaluative and deliberative*545 portions of organizations' files. *Korostynski, supra,* 266 *N.J.Super.* at 557, 630 *A.*2d 342; *Bundy v. Sinopoli,* 243 *N.J.Super.* 563, 580 *A.*2d 1101 (Law Div.1990); *Wylie, supra,* 195 *N.J.Super.* 332, 478

A.2d 1273. Others have accommodated the confidentiality concerns arising from potential disclosure of deliberative and evaluative processes by employing a balancing test instead of a more rigid privilege. Red Bank Register, Inc. v. Board of Educ., 206 N.J.Super. 1, 10-11, 501 A.2d 985 (App.Div.1985); Hussain v. Gardner, 264 N.J.Super. 208, 210-12, 624 A.2d 99 (Law Div.1993); Asbury Park Press, Inc. v. Borough of Seaside Heights, 246 N.J.Super. 62, 67-72, 586 A.2d 870 (Law Div.1990).

We decline to adopt the privilege of self-critical analysis as a full privilege, either qualified or absolute, and disavow the statements in those lower court decisions that have accorded materials covered by the supposed privilege near-absolute protection from disclosure. Instead, we perceive concerns arising from the disclosure of evaluative and deliberative materials to be amply accommodated by the "exquisite weighing process," Loigman, supra, 102 N.J. at 108, 505 A.2d 958 (quoting Beck v. Bluestein, 194 N.J.Super. 247, 263, 476 A.2d 842 (App.Div.1984)), that our courts regularly undertake when determining whether to order disclosure of sensitive documents in a variety of contexts. See Hammock v. Hoffmann-LaRoche, Inc., 142 N.J. 356, 381, 662 A.2d 546 (1995) ("[A] flexible balancing process adaptable to different circumstances must be conducted to determine whether the need for secrecy substantially outweighs the presumption of access."). In fact, we view concerns about revelation of self-criticism to be a subset of the more generalized confidentiality concerns that we already have addressed and that we have refused to protect with an absolute or qualified privilege. Supra at 540-44, 691 A.2d at 328-30. Our determination in this respect is especially appropriate given our holding in Dixon that we particularly disfavor privileges in the employment-discrimination context. Dixon, supra, 110 N.J. at 451-54, 541 A.2d 1046.

*546 Self-critical analysis, although deserving of substantial consideration when a court balances a party's need to know against another party's need

for confidentiality, is not qualitatively different from other confidential information, and thus does not require the protection of a broad privilege as opposed to a balancing of interests. Although both the courts and the Legislature have classified certain confidential communications as qualitatively different and thus deserving of an evidentiary privilege, e.g., N.J.R.E. 505 (psychologist privilege); N.J.R.E. 506 (physician-patient privilege); N.J.R.E. 508 (newsperson's privilege); N.J.R.E. 511 (cleric-penitent privilege); State v. Toscano, 13 N.J. 418, 424-25, 100 A.2d 170 (1953) (attorney-client privilege), such privileges are rooted in our jurisprudential traditions and reflect a firm societal commitment to preserving particular confidences even at the expense of truth. Given the presumption against the creation of new privileges and the potential breadth of privileging self-critical analysis, we do not **332 join those courts that have adopted the privilege.

Of course, as we already have noted, confidentiality concerns surrounding communications consisting of self-critical analysis, under certain rare circumstances, may outweigh the need for disclosure. Our rejection of the embodiment of such concerns in an evidentiary privilege should not be interpreted as denigrating the importance of candid deliberation and self-criticism. As the court stated in *Wylie, supra:*

Valuable criticism can neither be sought nor obtained nor generated in the shadow of potential or even possible public disclosure. It is not realistic to expect candid expressions of opinion or suggestions as to future policy or procedures in an air of apprehension that such statements may well be used against one's colleague or employer in a subsequent litigated matter. The purpose of an investigation intended to seek criticism ... of then existing policy or procedure is self-improvement. The value of the investigation is questionable if the input is not reliable. It is clear that the reliability of the input in this situation varies inversely with the risk of disclosure of the input or result-

ing criticisms.

[195 N.J.Super. at 340, 478 A.2d 1273.]

However, despite our recognition of the forcefulness of that argument, we are not as confident as the court in *Wylie* that *547 absolute confidentiality is always essential to encourage frank, productive self-evaluation. It is not so clear that disclosure inevitably will discourage candid self-criticism. As the court noted in *Tharp*, supra, in the employment context:

Permitting disclosure of an employer's self-critical analyses of its equal employment efforts may actually cause [an employer] to engage in a more honest assessment of its efforts because flaws in those analyses may be brought to light in civil litigation. The sunshine of public scrutiny would thus act as a catalyst to promote, not inhibit, employers to engage in full and candid equal employment assessments.... [A] weakly worded, unimaginative, and unaggressive analysis ... may be more damning than a candid evaluation recognizing a company's weaknesses and expressing a serious commitment to overcome those weaknesses.

[149 F.R.D. at 183 n. 13, 184 n. 16 (citation omitted).]

See also Louis L. Chodoff, Conducting a Sexual Harassment Investigation, N.J. Labor and Emp. L.Q., Winter 1997, at 4 (advising employers, in light of recent legal trend toward requiring disclosure of internal sexual-harassment investigatory materials, to conduct candid, thorough, and efficient investigations in order to avoid liability).

Moreover, as observed by the Appellate Division, when a deliberating body is required by law to prepare an honest report, replete with self-evaluation, we do not assume that that body will shirk its responsibilities in order to hide the truth. 262 N.J.Super. at 48-49, 619 A.2d 1037 (noting legal duty of employer to respond effectively to allega-

tions of sexual harassment); CPC Int'l, Inc. v. Hartford Accident & Indem. Co., 262 N.J.Super. 191, 195-204, 620 A.2d 462 (Law Div.1992) (rejecting application of privilege of self-critical analysis because of legal duty to prepare environmental report, which reduced the risk of deterring candid self-criticism through disclosure); Asbury Park Press, supra, 246 N.J.Super. at 69-70, 586 A.2d 870 (stressing legal duty of police officer to prepare accurate, honest investigatory report regardless of potential disclosure).

Given these competing views of human nature and institutional and organizational conduct, as well as the influence of legal rules on actors, we believe that case-by-case balancing is much more appropriate in accommodating self-critical analysis than is a per se *548 privilege. That approach comports with our preference for balancing, as opposed to categorical exclusionary rules, when addressing confidentiality concerns that arise during litigation. For example, we have noted, in the context of the common-law right of access to public documents, that our cases do not "sustain an absolute privilege of secrecy for all such investigatory materials.... A court should balance, in each case, the individual's right to the information against the public interest in the confidentiality of the file." **333Loigman, supra, 102 N.J. at 103-04, 505 A.2d 958; see also Home News v. State Dep't of Health, 144 N.J. 446, 456, 677 A.2d 195 (1996) (disapproving of per se nondisclosure rule for cause-of-death information on death certificates and reasoning that "[t]hat type of blanket prohibition is not consistent with the balancing approach mandated by the common law"); McClain, supra, 99 N.J. at 359-61, 492 A.2d 991 (balancing interests in determining whether to order disclosure of confidential investigative materials that reflected deliberative processes).

[17] Although trial courts should accord significant weight to self-critical analysis and although confidentiality concerns about such information at times may outweigh competing interests in disclosure (especially if the information is obtainable through

other sources), certain interests in disclosure are strong enough, in their reflection of important public policies, to outweigh such confidentiality concerns under most, if not all, circumstances. See Tharp, supra, 149 F.R.D. at 181-85 (holding that privilege of self-critical analysis did not apply in employment-discrimination cases, in part, because "disclosure of employers' 'self-critical analysis' materials may play a crucial function in civil litigation to eradicate discrimination that exists in the work place"); Korostynski, supra, 266 N.J.Super. at 558-59, 630 A.2d 342 (recognizing that elimination of discrimination was a weightier interest than most private interests); CPC Int'l, supra, 262 N.J.Super. at 195-204, 620 A.2d 462 (ordering disclosure of corporation's environmental reports because of strong public interest in disclosure of private documents relating to environmental protection).

*549 We recognized one such public policy in Dixon, where we stressed the paramount public interest in the eradication of discrimination, an interest that outweighed the interest in confidential communications in the tenure process. Dixon, supra, 110 N.J. at 451-54, 541 A.2d 1046. We then stated that in determining whether to disclose documents relating to a discrimination claim, the trial court must "satisfy itself that the discrimination charge is valid and the material requested is relevant.... By requiring the plaintiff to demonstrate that the claim is valid and the material relevant, we intend to place only a modest burden on the plaintiff." Id. at 455, 541 A.2d 1046.

[18] Paralleling its argument about the asserted public policy of confidentiality, defendant contends that its interest in nondisclosure of its self-criticism is also reflective of the public policy of eradicating discrimination, thus weighing against disclosure. Although this particular interest in nondisclosure is more substantial than many other interests, for the reasons previously advanced, supra at 541-43, 691 A.2d at 329-30, we believe that the balance, assuming a valid claim and relevance, is normally best struck in favor of disclosure. As we described in

Dixon, supra, however, acknowledging the need to order disclosure does not end the inquiry. Instead

[b]efore giving the plaintiff access to the confidential materials ... the trial court should take various measures designed to minimize intrusion into their confidentiality. In this connection, we rely on practical, common-sense applications of rules of discovery that are familiar to trial courts in order to resolve most of the problems of confidentiality.... Although the protective measures a trial court may choose to employ will vary according to the circumstances of each case, we recommend that compelled disclosure of confidential ... materials be accompanied by a protective order that limits access to persons directly involved in the case.

[110 N.J. at 456, 541 A.2d 1046 (quotations and citations omitted).]

Consequently, we reject the privilege of self-critical analysis in favor of a case-by-case balancing approach. Because of the powerful public interest in eradicating discrimination and sexual harassment, we believe that the balance generally will favor disclosure in this type of case, although there may be specific documents of such limited relevance or of such high sensitivity *550 that the balance will favor nondisclosure. If a trial court determines that disclosure is warranted, which will normally be the case in discrimination lawsuits, it should take adequate protective measures to ensure maximal confidentiality given the necessity of disclosure.

**334 C.

[19] Defendant maintains that the attorney-client privilege protects the entire investigatory process because attorneys employed by defendant participated in the investigation. We disagree with that blanket contention and instead agree with the Appellate Division that the record is currently insufficient to resolve this issue. Accordingly, we require the trial court on remand to "review the documents

in camera in light of Lehmann, the principles applicable to the attorney-client privilege, and the need to shield the identities of witnesses who provided information to the Authority" and then to "make specific determinations regarding plaintiff's access to them, including an expression of reasons for the court's rulings." 292 N.J.Super. at 52-53, 678 A.2d 279. In so doing, the court will have to determine the exact role that an attorney played regarding each particular document for which the privilege is asserted. Despite our inability to dispose of this claim in its entirety, we provide some guidance to the trial court on the standards that it should apply in this inquiry.

[20][21] While an organization or corporation like defendant can be a "client" for purposes of the privilege, N.J.R.E. 504(3); Upjohn Co. v. United States, 449 U.S. 383, 395, 101 S.Ct. 677, 685, 66 L. Ed.2d 584, 595 (1981); In re Grand Jury Subpoenas, 241 18, 28-29, 574 A.2dN.J.Super. (App.Div.1989); In re State Comm'n of Investigation, 226 N.J. Super. 461, 544 A.2d 893 (App.Div.), certif. denied, 113 N.J. 382, 550 A.2d 484 (1988), a fine line exists between an attorney who provides legal services or advice to an organization and one who performs essentially nonlegal duties. An attorney who is not performing legal services or providing legal advice in some form does not qualify as a "lawyer" *551 for purposes of the privilege. Thus, when an attorney conducts an investigation not for the purpose of preparing for litigation or providing legal advice, but rather for some other purpose, the privilege is inapplicable. United Jersey Bank v. Wolosoff, 196 N.J.Super. 553, 563, 483 A.2d 821 (App.Div.1984). That result obtains even where litigation may eventually arise from the subject of the attorney's activities. Ibid.

[22] The key issue regarding the applicability of the privilege in this case is the purpose of the various components of the investigation that defendant initiated into plaintiff's allegations of sexual harassment. If the purpose was to provide legal advice or to prepare for litigation, then the privilege applies.

However, if the purpose was simply to enforce defendant's anti-harassment policy or to comply with its legal duty to investigate and to remedy the allegations, then the privilege does not apply.

Although, given the state of the record and the trial court's failure to conduct an in camera review of the documents at issue, we are unable to draw conclusions regarding specific documents, we do not perceive the investigation that defendant performed as being one that generally is covered by the privilege. Defendant allegedly initiated the investigation months before plaintiff brought suit against it. The timetable thus suggests that defendant began to investigate in order to comply with its internal policies and to fulfill its legal duty under Lehmann. Although any internal sexual-harassment complaint has the potential to balloon into a lawsuit, effective internal remediation is independently necessary and may prevent such an eventuality. Thus, it is unclear, and perhaps unlikely, that the attorneys involved in the investigation were truly or primarily acting in their legal capacities. We agree with the statement that

[i]f all activities of a lawyer are to be classified as warranting the bar of discovery proceedings because of the attorney-client privilege, then it would be appropriate for clients to retain lawyers as investigators, custodians of records and the like, thereby turning the shield of the privilege into the sword of injustice.

[Metalsalts Corp. v. Weiss, 76 N.J.Super. 291, 299, 184 A.2d 435 (Ch.Div.1962).]

*552 A substantial number of sexual-harassment lawsuits raise the issue of the employer's response to the employee's internal complaint. If the attorney-client privilege were to apply broadly to any internal investigation of this type undertaken by an attorney, regardless**335 of the pendency of litigation or the provision of legal advice, then all employers would commission attorneys as investigators, thus defeating the paramount public interest in eradicating discrimination as expressed in the LAD

and as interpreted in *Lehmann* and *Dixon*. The Appellate Division expressed this point: "We deem it unlikely that ...*Lehmann*, having defined a cause of action against an employer based in part on the employer's response to a harassment complaint, [may be read] to permit an employer to immunize its response from inquiry by assigning a lawyer to investigate the complaint." 292 *N.J.Super*. at 50, 678 A.2d 279.

Moreover, the privilege, although important, is not sacrosanct. It "may be pierced upon a showing of need, relevance and materiality, and the fact that the information could not be secured from any less intrusive source." *Id.* at 52, 678 A.2d 279 (citing *In re Kozlov,* 79 N.J. 232, 243-44, 398 A.2d 882 (1979)). That principle is especially appropriate in this case, where the powerful public interest in eliminating discrimination and sexual harassment is present and where defendant's claim to the privilege is tenuous at best.

In any event, despite our doubts about the applicability of the privilege based solely on the status of those involved in the investigation as attorneys, we stress that the trial court must evaluate the individual documents at issue *in camera* to determine what role an attorney may have had in the creation of those particular documents. *See Wolosoff, supra*, 196 *N.J.Super.* at 563, 483 *A.*2d 821. The privilege very well may apply to portions of the investigation, thus requiring redaction or suppression if effective redaction is impossible.

[23] If the trial court should determine that the privilege applies to particular aspects of the investigation-for example, *553 specific parts of the investigation after plaintiff filed this lawsuit-it then must determine whether defendant has waived the privilege by raising the investigation as an affirmative defense. A party may not abuse a privilege, including the attorney-client privilege, by asserting a claim or defense and then refusing to provide the information underlying that claim or defense based on the privilege. *Id.* at 565-67, 483 A.2d 821 (canvassing cases holding that waiver had occurred

when party asserting privilege attempted to rely on privileged information as claim or defense); cf. Brogan v. Passaic Daily News, 22 N.J. 139, 151-52, 123 A.2d 473 (1956) (holding that newspaper had waived Shield Law privilege by relying on quality of informant in defense to libel action), overruled in part by Maressa v. New Jersey Monthly, 89 N.J. 176, 194-96 & n. 8, 445 A.2d 376 (relying on statutory amendment to overrule Brogan waiver holding in Shield Law context), cert. denied,459 U.S. 907, 103 S.Ct. 211, 74 L.Ed.2d 169 (1982). To allow such conduct would be truly inequitable. As the court stated in Wolosoff, supra:

We note the inherent inequity in permitting [a party] to use the privilege as a sword rather than a shield. If permitted to do so, [a party] could divulge whatever information is favorable to its position and assert the privilege to preclude disclosure of the detrimental facts. The resulting half-truth that would be revealed might well be more disabling than a total distortion.

[196 N.J.Super. at 567, 483 A.2d 821.]

See also Chodoff, supra, at 4 (noting the "well-reasoned arguments supporting the view that an employer may not assert as a defense to a sexual harassment lawsuit the fact that it conducted a prompt and thorough investigation and took reasonable remedial action ... without being required to disclose the substance of the investigation which forms the basis for that defense").

We note a recent federal decision that held, in circumstances strikingly similar to this case, that the defendant-employer had waived the attorney-client privilege regarding the contents of its investigation when it had attempted to use the results of the investigation to preclude liability under the LAD and Title VII. *Harding, supra*, 914 *F.Supp*. at 1091-97. The court stated that the defendant had

*554 attempted to utilize the results of [the attorney's] investigation ... as a defense to liability.... Consequently, [defendant] cannot now argue that its own process is **336 shielded from discovery. Consistent with the doctrine of fairness, the plaintiffs must be permitted to probe the substance of [defendant's] alleged investigation to determine its sufficiency.

[Id. at 1096.]

Defendant attempts to avoid application of waiver by reasserting that its affirmative defense solely concerns the final result of its investigation, namely, the sanctions that it imposed on Geberth and Stankowitz. However, we have rejected that argument because of the relevance of the entire investigatory process to plaintiff's attempt to overcome this affirmative defense. Supra at 537-39, 691 A.2d at 327-28.

Thus, it appears that defendant, by relying on the affirmative defense of having conducted an effective investigation into plaintiff's allegations, has waived the attorney-client privilege, assuming that the privilege applies to certain documents relating to the investigation. However, the trial court should conduct an *in camera* review of the materials at issue to determine if the privilege applies to specific documents, and, if so, whether those documents are so tenuously related to the affirmative defense that waiver is overcome despite the assertion of that defense.

D.

[24][25] Our analysis of the applicability of the work-product doctrine is similar to that of the attorney-client privilege. In order for the doctrine to apply, the materials must have been prepared in anticipation of litigation and not in the ordinary course of business, Wylie, supra, 195 N.J.Super. at 337, 478 A.2d 1273, and there must not be a "substantial need" for the materials. R. 4:10-2(c); Jenkins v. Rainner, 69 N.J. 50, 58, 350 A.2d 473 (1976). Moreover, the doctrine's protection must not have been waived. In re Envtl. Ins. Declaratory Judgment Actions, 259 N.J.Super. 308, 612 A.2d 1338

(App.Div.1992).

We believe that the work-product doctrine most likely does not protect the investigatory materials in this case. As we noted in *555 our discussion of the attorney-client privilege, the investigation allegedly began months before plaintiff commenced this litigation, although the conclusion of the investigation occurred after she had brought suit. In addition, plaintiff has demonstrated need for the documents relating to the investigation. The Appellate Division correctly noted that "[t]he information plaintiff may develop by deposing the same informants [who participated in the investigation] would not necessarily replicate what those informants told the Authority." 292 N.J.Super. at 52, 678 A.2d 279. Plaintiff needs to know exactly what defendant knew and when it knew it, information that she can obtain only by gaining access to the actual investigatory materials. Finally, defendant may have waived the protection of the doctrine by asserting the investigation as an affirmative defense.

Our doubts to one side, the trial court should conduct an *in camera* inspection of the documents to determine whether any are work-product and, if so, whether that consideration is outweighed by plaintiff's "substantial need," and, further, whether defendant's affirmative defense has waived the protection of the doctrine.

E.

[26][27] The Open Public Meetings Act ("the Act"), N.J.S.A. 10:4-6 to -21, guarantees the public notice of and access to the meetings, including executive sessions, of public bodies. The Legislative intent behind the Act is quite broad. The Act states that it is

the public policy of this State to insure the right of its citizens to have adequate notice of and the right to attend all meetings of public bodies at which any business affecting the public is discussed or acted upon in any way except only in those circumstances where otherwise the public interest would be clearly endangered or the personal privacy or guaranteed rights of individuals would be clearly in danger of unwarranted invasion.

[*N.J.S.A.* 10:4-7.]

[28] Although the Act creates a strong presumption of access to the meetings of public bodies, N.J.S.A. 10:4-12a, it does enumerate certain circumstances under which **337 the presumption is *556 rebutted. N.J.S.A. 10:4-12b. Those exceptions, though important, are qualified in two ways. First, courts strictly construe them against closure, given the stated legislative intent that such meetings are to be open to the public unless "the public interest would be clearly endangered or the personal privacy or guaranteed rights of individuals would be clearly in danger of unwarranted invasion." N.J.S.A. 10:4-7 (emphases added); e.g., Accardi v. Mayor and Council of North Wildwood, 145 N.J.Super. 532, 540-41, 543, 368 A.2d 416 (Law Div.1976) (noting Act's strong presumption against closure).

[29][30] Second, a public body that meets in private generally must make the minutes of its meeting "promptly available to the public." N.J.S.A. 10:4-14. In South Jersey Publishing Co. v. New Jersey Expressway Authority, 124 N.J. 478, 591 A.2d 921 (1991), we interpreted this provision as requiring prompt availability even when the public body, in accordance with the Act, has met in closed session. Id. at 493-96, 591 A.2d 921. We stated that

[t]he Legislature ... expressed its strong policy favoring adequate disclosure of all actions taken by public bodies, whether at public meetings or executive sessions.... In our view, it would be anomalous to interpret the Open Public Meetings Act, enacted by the Legislature to enhance the public's access to and understanding of the proceedings of governmental bodies, in a manner that foreclosed the public's right to obtain material and information vital to its ability to evaluate the wisdom of governmental action.

[Id. at 493-94, 591 A.2d 921.]

In order to accommodate any privacy interest that may be implicated by disclosure of the minutes of a legitimate closed session, we determined that "the extent of disclosure may be modified appropriately ... provided the public interest is not subverted." *Id.* at 494, 591 *A.*2d 921 (citation omitted).

[31] Although our discussion of the Act in South Jersey Publishing addressed one particular exception to the general requirement of conducting public meetings (the personnel exception), we perceive its reasoning to extend to all of the Act's exceptions. In other words, if a public body legitimately conducts a meeting in closed session under any of the exceptions enumerated in N.J.S.A. *557 10:4-12b, it nevertheless must make the minutes of that meeting "promptly available to the public" unless full disclosure would subvert the purpose of the particular exception. If disclosure would subvert the purpose of an exception, then the subversion must be balanced against the applicant's interest in disclosure. We believe that only the unusual case will justify total suppression of the minutes of a closed session; such a case would require great harm to the public interest underlying the exception from even minimal disclosure as well as a negligible interest in disclosure.

In the vast majority of cases in which full disclosure would have an adverse impact on the purpose of the particular exception, other methods of maintaining confidentiality can be achieved, such as redacting the specific information that would undermine the exception. We stress, however, that, given the Legislature's strongly stated intent to effectuate broad public participation in the affairs of governmental bodies, few cases will require even partial nondisclosure.

[32] In this case, defendant asserts three grounds for not disclosing the minutes of its executive session, namely, N.J.S.A. 10:4-12b(3) (relating to "unwarranted invasion[s] of individual privacy"), (7) (relating to pending litigation or matters other-

wise covered by the attorney-client privilege), and (8) (relating to personnel matters). Regarding the personnel exception, we find the assertion to be without merit. In *South Jersey Publishing, supra*, we stated that

[t]he purpose of the personnel exemption is to facilitate the process by which the public body makes personnel-type decisions, permitting the debate and deliberation to be conducted without public scrutiny or participation. But the exemption is designed to enable the public body to determine the appropriate action to be taken, not to withhold from the public either the public body's determination or the reasons on which its determination was based.

**338 [124 N.J. at 493-94, 591 A.2d 921.]

Although, in some exceptional cases, the minutes of a closed session regarding personnel decisions may be altered appropriately to protect confidentiality and in some very unusual cases, the minutes may be suppressed entirely, in this case, the exception *558 does not afford the minutes any protection because any confidentiality concerns are moot given the public announcement of Gebert's and Stankowitz's punishments and plaintiff's having filed suit. FN2 Moreover, even if these confidentiality concerns were not moot, we believe that the powerful public policy, expressed in the LAD, of eradicating discrimination would require full disclosure under this exception.

FN2. Of course, we recognize that the confidentiality interests of various witnesses, apart from plaintiff, Gebert, and Stankowitz, are not moot. However, the Act is not the proper basis for protecting their confidentiality. Instead, the court should rely on its power to protect confidentiality under the balancing test that we have discussed previously. See supra at 540-44, 691 A.2d at 328-30.

The exception embodied in N.J.S.A. 10:4-12b(3),

regarding invasion of privacy, is entirely inapplicable. By its terms, it applies only to governmental entities engaged in social-service and health-care programs and to individuals "admitted to or served by such institutions or programs." *Ibid.* The section clearly excludes defendant's operation of a highway.

[33] We view N.J.S.A. 10:4-12b(7), relating to pending litigation and material covered by the attorney-client privilege, as duplicative of the protection otherwise afforded by the attorney-client privilege and work-product doctrine. If a communication is covered by the privilege, then the public body legitimately may meet with its attorney in closed session. The minutes, part or all of which may constitute work-product, then may be appropriately suppressed or redacted.

As we already have stated, *supra* at 550-54, 691 A.2d at 333-36, the attorney-client privilege and work-product doctrine may apply to certain aspects of the investigation and the executive session, thus potentially requiring limited redaction and possibly (though not probably) calling for the withholding of specific documents. Suffice it to say that the Act provides no greater protection, and arguably provides less protection, than the privilege and doctrine in general. *See N.J.S.A.* 10:4-12b(7) (qualifying*559 the privilege by the statement that it applies only "to the extent that confidentiality is required in order for the attorney to exercise his [or her] ethical duties as a lawyer").

We thus conclude that, in this case, the exceptions to the Act's general requirement of public meetings provide no additional protection to the materials at issue than that provided by the privileges and public policies that we already have discussed.

IV

[34] Our discussion makes clear that we concur in the Appellate Division's vacation of the protective order. While we normally defer to a trial court's disposition of discovery matters, including the formulation of protective orders, unless the court has abused its discretion, Hammock, supra, 142 N.J. at 380, 662 A.2d 546; Garden State Community Hosp. v. Watson, 191 N.J.Super. 225, 228, 465 A.2d 1225 (App.Div.1982), certif. denied, 94 N.J. 518, 468 A.2d 176 (1983), deference is inappropriate if the court's determination in drafting its order is based on a mistaken understanding of the applicable law. Alk Assoc. v. Multimodal Applied Systems, Inc., 276 N.J.Super. 310, 314-15, 647 A.2d 1359 (App.Div.1994).

The remand in this case should be guided by what we stated in a related context:

The need for secrecy must be demonstrated with specificity as to each document. Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, are insufficient.... [T]he trial court ... must examine each document individually and make factual findings with regard to why [suppression is warranted].... The need for secrecy should extend no further than necessary to protect the [demonstrated need for] confidentiality.

[*Hammock*, *supra*, 142 *N.J.* at 381-82, 662 *A.*2d 546.]

The trial court, in readdressing discovery, should craft a new protective order that accurately balances the public interest in the eradication of discrimination and sexual harassment against the various confidentiality concerns that defendant has asserted. **339 The court should begin with the presumption that all of the documents sought by plaintiff are discoverable, given their relevance to *560 plaintiff's claim that defendant did not effectively remediate the alleged harassment and to defendant's affirmative defense that it did. The court then should provide defendant with the opportunity to make particularized assertions of privilege or confidentiality regarding *specific* documents.

Accordingly, we affirm the judgment of the Appel-

late Division and remand the cause to the Law Division for proceedings not inconsistent with this opinion.

For affirmance and remandment-Justices HAND-LER, O'HERN, GARIBALDI, STEIN and COLE-MAN-5.

Opposed-None.

N.J.,1997.

Payton v. New Jersey Turnpike Authority 148 N.J. 524, 691 A.2d 321, 73 Fair Empl.Prac.Cas. (BNA) 1149, 70 Empl. Prac. Dec. P 44,645

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